THE DILEMMA OF PENAL REFORM

THE DILEMMA OF PENAL REFORM

BY

DR. HERMANN MANNHEIM

Lecturer in Criminology at the
London School of Economics and Political Science
Sometime Leon Fellow of
The University of London
Formerly
Judge of the Court of Appeal in Berlin
and Professor in the
Faculty of Laws, Berlin University

WITH A PREFACE BY

PROFESSOR
A. M. CARR-SAUNDERS

Director of the
London School of Economics
and Political Science

GEORGE ALLEN AND UNWIN LTD
40 MUSEUM STREET
LONDON

FIRST PUBLISHED IN 1939

PRINTED IN GREAT BRITAIN
in 11-point Baskerville Type
BY UNWIN BROTHERS LIMITED
WOKING

PREFACE

THE position of this country in relation to penal reform is remarkable. Beginning with the works of John Howard we have a wealth of literature describing the treatment of offenders. During the years 1914 to 1918 many persons were imprisoned who were well able to give first-hand accounts of prison conditions from the point of view of the prisoner, and we began to get pictures from inside added to those taken from outside which we already possessed. We are fortunate also in that we have had so many notable examples of self-sacrifice in the cause of penal reform. All this has not been in vain. Though we have not led in prison reform among the countries of the world, we have never lagged far behind the best practice of the time. On the other hand relatively few scientific studies of offenders and offences have been made in this country; the work of the late Dr. Goring and a few others are exceptions which only prove the rule. There is a still more conspicuous lack of literature dealing with the sociological and ethical problems involved.

In view of our not inconsiderable achievements in penal reform it may be asked whether our inattention to the scientific and philosophical aspects of the problem have greatly mattered so far. This is too large a question to discuss here. What is plain is that, if we continue to disregard these aspects, we shall do so at our peril; for so far we have done little more than sweep away crudities and barbarities, and we are now faced with the far more difficult task of constructive action. For this purpose we need in the first place the most accurate analysis of offences and

offenders that we can make. We have to bring to bear upon the facts of crime all our resources of sociological and psychological investigation. In the second place we have to attain some clarity in our ideas regarding the social responsibility of normal citizens towards those who offend, and regarding the concepts of guilt, punishment and reformation. Dr. Mannheim's book is a general survey of this latter aspect of the whole question.

Under these circumstances it is appropriate to ask why we have so far in this country been less attentive to these aspects of penal reform than has been the case in other countries. In part the answer is that criminology is not a recognized subject of study in our universities. This fact suggests the further question why they have neglected the study of criminology. For this there are many reasons the discussion of which would hardly be fitting here. It is enough to emphasize that the neglect exists. When this fact has been sufficiently widely recognized, we may hope that the defect will be remedied. The universities are, however, moving; the delivery in the session of 1938–39 at the London School of Economics of a course of public lectures on penal reform by Dr. H. Mannheim is evidence of this new activity on their part. This book makes these lectures available to a wider public. It may be added as further evidence of the growing interest of universities in this problem that the London School of Economics now offers regular courses in this subject.

It would be difficult to find anyone better suited than Dr. Mannheim to discuss penal reform. In the first place, his experience is not confined to one country; secondly, he is a trained scholar in this field, and

thirdly, he has had many years service as a judge. It is to be hoped that he will find a circle of readers for his lectures in written form as large and interested as the audience of listeners who attended when they were delivered.

A. M. CARR-SAUNDERS

LONDON SCHOOL OF ECONOMICS
AND POLITICAL SCIENCE

FOREWORD

THIS little book is somewhat in the nature of a first instalment. Whilst the author was engaged in carrying out some research into the development of crime in England since 1910 (under the Leon Fellowship of the University of London), the Director of the London School of Economics and Political Science suggested to him that the great amount of interest aroused by the publication of the Criminal Justice Bill of 1938 might make it desirable to have at the School a course of public lectures on Penal Reform. It was with great pleasure that the author took advantage of this opportunity—all the more since in the course of his research as well as in connection with his teaching work he had encountered certain problems that did not seem to have received due attention on the part of the theorist.

Penology has in recent years become so complicated and its scope so wide that it is at present hardly possible for the expert to combine both practical experience and theoretical knowledge of every part of it. The day for an encyclopaedic and, at the same time, scientific treatment of the penal problem as a whole has not yet arrived. Specialized researches, undertaken in an encyclopaedic spirit, would still seem to be most needed. If, nevertheless, the following chapters—which except for some additions conform to the original lectures—have been devoted to a subject so broad that the treatment can hardly be much more than superficial, the special occasion for which the course was intended may serve as an excuse.

The author feels that he cannot issue this book

without expressing his gratitude to the Director of the London School of Economics and Political Science for kindly arranging the course and writing a preface to the book, to the Leon Bequest Committee for their generous assistance, and to his friends for their valuable advice and encouragement.

CONTENTS

CHAPTER I

INTRODUCTION

THE preparation and passing of important new penal legislation has always provided an opportunity for a critical discussion of the country's penal system in general. The introduction of the Criminal Justice Bill, 1938, has proved no exception to this rule. For the last few years English penologists have been devoting great attention to its preliminary stages and the parliamentary debates upon it. The present writer, who has been privileged to study the penal system of this country during the past five years as an outsider, has no intention of competing with their published comments, as he cannot claim that specific knowledge which only inside experience of the daily working of such a system can give. Nor is it in any way his desire to tackle the compact body of questions connected with prison administration, with the struggle against capital punishment, and similar problems. He ventures, however, to contribute his modest quota to the discussion by attempting briefly to consider the significance of the great legislative achievement which the Bill represents, for the future trend of penal policy in general and for certain aspects of it that are particularly likely to embarrass the penal reformer, because they are least capable of a successful solution by means of legislative changes alone.

It might perhaps be said that the present Bill, in fulfilling so many wishes of the reformer, has left hardly anything for the future work of the penologist, and that Penal Reform may now rest on its laurels. Surely,

such an attitude would mean a complete misunderstanding of the possibilities of a legislative Act in this field and of the functions of Penology. No penal statute can do more than furnish the framework, the basis for the practical work of the Courts and the penal administration. The more the new legislation concerns itself with providing new types of penal institutions and new methods of dealing with offenders, the more evident will be the need of further developing the science of Criminology and Penology, in order to draw the fullest advantage from the wealth of material that is now being collected.

"Should the criminologist be encouraged?"—was the subject of a lecture delivered only six years ago by one of the greatest English experts in this field,[1] and the very title illustrates sufficiently the precarious position in which theoretical studies of this kind still find themselves, in spite of the interest which the subject arouses in wide circles of the general public. Far from belonging to the "Haves" in the world of science, Criminology and Penology—to use the familiar and congenial terminology of the Children and Young Persons Act, 1933—are still greatly "in need of care and protection," though it can confidently be expected that they will never get "beyond control."

Reference has been made to Criminology and Penology as to *a science*. But even the use of this term has been challenged. It has become almost a fashion to place both words in quotation marks in order to stress their doubtful character and antecedents. To place penologists between inverted commas is like clothing a prisoner in a prison garb: both detract

[1] Mr. Alexander Paterson, *Transactions of the Medico-Legal Society*, Vol. XXVI (1933).

somewhat from their dignity as human beings, and it is not too pleasant to have to appear before the public in such apparel. Sometimes the use of quotation marks may simply be due to a misunderstanding. If we read, for instance, in the preface to an admirable book on the English prison system[1] that this book's first aim is "to give an objective and comprehensive view of the system as it is, rather than as it has been or ought to be: the historical matter is therefore limited to what is necessary for proper understanding of present practice and no attempt is made to trespass on the ground of the 'penologist,'" it becomes clear that the learned writer regards the penologist as one of those useless cranks who, without being interested in the past and present of penal methods, confine themselves exclusively to more or less fantastic speculations about the future. If this were a true picture of modern penologists, everybody would be willing to place them between quotation marks. It is, however, hardly necessary to say that this is not the case. Modern Penology is primarily a science of facts, past and present, and it is only from a careful study of facts and of hard realities that it ventures to make any suggestions for the future.[2]

Of what kind, then, are these hard realities? At first glance it seems very easy to solve all problems of Penal Reform and to establish a penal system that would satisfy all reasonable demands. Why, then, is it so desperately difficult in actual practice? There

[1] L. W. Fox, *The Modern English Prison* (1934).

[2] As to the character of Criminology as a science see Professor Thorsten Sellin's interesting remarks in *Culture Conflict and Crime*. A Report of the (Social Science Research Council's) Sub-committee on Delinquency, New York, 1938, pp. 4 et seq.

seem at present to be two main reasons for this: First, the very foundations of the penal system, the conceptions of crime and punishment themselves, as well as their boundaries, have become vague. Just as, throughout the world, territorial frontiers have been shattered, so the former demarcations between those essential terms and neighbouring territories have almost been extinguished. This is particularly true in the field of the criminal law and its application. Has it not in some parts of the world become only a matter of chance, of the political creed or race of the offender, whether an act is treated as a heinous crime or a feat of heroism? Where the political and the criminal history of a country have to be regarded as one and the same thing, where crime is being stamped out by being made lawful, it is of no use applying the old criminological conceptions, since the traditional values, the feeling of right and wrong have gone by the board. This is, of course, an extreme example and only true for some countries. But there is no doubt that a search for new standards is going on almost everywhere, and the scale of criminological values cannot consequently remain unaffected. Even where the façade of the criminal law has remained intact, certain sections of it may have forfeited a considerable part of that popular respect which is necessary for their proper functioning. This may be due to the fact that some of those human and social values for the vindication of which the law is intended are no longer commonly accepted as worthy of unconditional protection—it may also be that, in spite of their undisputed worth, they are too obviously and without any instant punishment disregarded and scorned by the wielders of modern power politics. A "smash and grab" policy

—even if carried on somewhere abroad and under the cloak of the time-honoured maxim that a State can do no wrong—such a policy does certainly offer a strong incentive to individual acts of lawlessness without any political motives. This is the true explanation of many of those regrettable happenings for which the blame is all too hastily laid at the door of the so-called over-leniency of present-day penal methods. To expect from a penal system that it should by itself create law-abiding citizens can only be regarded as a grotesque over-estimation of its powers. Such a spirit of law-abidingness cannot be established by force—it can only be secured by improving the standards of living and of education, and by the setting of a good example.

A closer investigation, the results of which the author hopes to publish elsewhere, shows that in England the War and post-War period have seen far less drastic changes of this kind than in other parts of the world. That they are, however, not entirely absent may be gathered—to give only a few instances —from some remarks in the recent Report of the London County Council Education Officer on Juvenile Delinquency[1] on the subject of "scrounging" or "winning," from the indisputable increase in shoplifting, in railway frauds and similar offences against impersonal bodies, or from the difficulties experienced in fighting the evil of street book-making. In some cases of this kind it is the weakening of the belief in the moral justification of a certain penal statute that is not the least feeble factor in the causation of the offence.

[1] *Report*, No. 3256 (1937), p. 12. See also the *Fifth Report of the Home Office, Children's Branch* (1938), p. 43.

If this be so, if therefore a considerable part of present-day delinquency be due to doubts—perhaps only subconscious—as to the moral turpitude of such behaviour, what then are the conclusions to be drawn in the field of penal policy and in particular with regard to the aims of punishment as hitherto conceived? Having had our belief in its deterrent effect badly shaken, we began to clutch at the catchword of reformation—only to be told that this can too rarely be achieved to be acceptable as the supreme goal of a penal system.[1] Protection of society is now taken to be the real object, to which all other aspects must be subordinated. To this, however, it might be objected that "protection of society" is also often unattainable in practice. Moreoever, self-evident as it is for every law-abiding member of a well-ordered society—if too loudly proclaimed as the ultimate end of punishment it may provoke the lawbreaker's retort: Why *this* particular society? In the end, this is essentially a *moral problem*, and one which can in no way be evaded by Penology. It was regarded as a great achievement of the fifteenth and sixteenth centuries to have established a clear-cut line of demarcation between the *realm of morals* and that of *politics*, and as an equally great success of the eighteenth and nineteenth centuries to have made the *criminal law* independent of *morality*. To-day, we are faced with the heap of ruins which is —at least partly—the result of those ideas. The author would be the first to admit that the Criminal Court judge, in his daily work, cannot act as the executor of moral commandments—that would be entirely beyond the power of human skill and endurance.

[1] See Mr. Leo Page, *Crime and the Community* (1938), pp. 78 et seq.

But on *principle* to divorce the idea of punishment by the State from moral considerations has, in the long run, proved a fatal error. Only on a moral basis is it possible to argue successfully with the lawbreaker. The recent changes, referred to below, in the Soviet theories on the subject are a case in point. It is now regarded as one of the greatest mistakes of Pashukanis that he tried to eliminate the conception of guilt from the criminal law by substituting for it the neutral one of social dangerousness. The Russian people, it is said, would not tolerate such an evisceration of the essential parts of the penal system.[1] Though the legal conception of guilt is not identical with the moral one, a criminal law that does no longer acknowledge the guilty mind (*mens rea*) as an essential condition of punishment, has certainly severed the last link which connects it with moral ideas.

Once more, one should not misunderstand so much emphasis being placed on the need for reconstructing the conceptions of crime and punishment upon a moral basis: Firstly, in spite of all our efforts there will always remain a certain amount of antagonism between the two, arising from several reasons.[2] In the realm of morality a sufficient margin must be left to personal discretion, whilst the criminal law prescribes no more than a standardized morality. Moreover, the Penal Code has to take into account the external consequences of an action, by punishing, for instance, the

[1] See below, p. 39, and esp. A. Stoupnitzky, *Revue criminelle et de Droit Pénal Comparé*, 1938, p. 374.

[2] This old problem has recently been admirably discussed by Professor W. E. Hocking in *Law: A Century of Progress*, 1835–1935, Contributions in Celebration of the Hundredth Anniversary of the Founding of the School of Law of New York University, Vol. II (1937), pp. 242 et seq.

attempted crime less severely than the completed one.[1]

Emile Durkheim[2] bases his objections against any confusion of crime and moral wrong-doing upon the idea that legal definitions as contrasted with the vagueness of moral ideas must be neat and precise. From this he concludes that only such immoral actions as are capable of being defined in precise terms ought to be made punishable. This is true in so far as legislative technique has, on the whole, endeavoured to formulate penal statutes with absolute accuracy and to restrict the scope of penal sanctions to the violation of such social values as can be clearly defined. Every lawyer knows however that at least the first of these two aims is often unattainable. Because of the vagueness of most terms at the disposal of the legal draftsman and also because new and unforeseen problems are constantly arising out of the practical difficulties of daily life, the application of a penal statute may become more and more removed from the legal and moral ideas upon which it was originally based. Vagueness and lack of predictability as to their ultimate effect are therefore no less characteristic of penal statutes than of moral commandments, and a reasonable interpretation of the former may, in the course of time, become still more difficult if there is no moral idea behind them to act as a guide. If, on the other hand, the alleged vagueness of moral laws should refer not so much to their formulation, but to the difficulty of arriving at unanimously accepted moral commandments—here again the position is no more favourable

[1] The French Code Pénal (art. 2) takes a different attitude.

[2] *The Division of Labour in Society* (English edition by George Simpson), p. 78.

in the field of the present criminal law. Even from the point of view of legal policy there is hardly any uniformity of opinion as to whether—to give only a few examples—attempted suicide, homosexual activities, adultery, euthanasia and certain types of abortion should or should not be generally treated as criminal offences.

The ethical conceptions upon which the application of the law is to be based should, of course, be in harmony with at least the fundamental ideas common to the whole of mankind. A moralized penal system that embodies *wrong* ethical ideas is surely worse than one that makes no moral claims at all. To illustrate this point, we need only refer to the way in which the problem has been dealt with in post-War Germany. The tremendous shock which all social and moral values had then received resulted in determined efforts to lend to the whole structure of the criminal law an ethical atmosphere. The legal doctrines of guilt, of necessity, compulsion and many others were revised so as to harmonize as closely as possible with the moral standards of each citizen. There can be little doubt that this individualistic tendency was sometimes overdone.[1] Under the Nazi régime this permeation of the criminal law by "moral" ideas has continued, while the former excess of different individualistic standards—here as in every aspect—has been replaced by the most rigid uniformity. Unfortunately, however, this uniform moral standard is wrong in itself, showing all the characteristics of Nazi morals in general. Since it is hardly necessary to prove this

[1] See the author's remarks in the *Journal of Comparative Legislation and International Law*, Third Series, Vol. XVII (1935), pp. 241 et seq.; Vol. XVII (1936), p. 174.

in detail, only one example need be given of the new moral atmosphere pervading the present criminal law of Germany—an example that is not even taken from the sphere of political crimes: it is the old problem as to whether it should be an offence to abstain from saving another person's life, if it could be done without any personal risk. In spite of Bentham's rhetorical question:[1] "Who is there that in any of these cases would think punishment misapplied?", such an omission has not yet been made punishable by English law.[2] German law, by an Act of May 28, 1936, however, has established a positive duty of this kind in cases where "reasonable public opinion" requires it. As the official commentary points out, this is a consequence of national-socialist views as to the duties of the individual citizen towards the *Volksgemeinschaft* (community of citizens) and his *Volksgenossen* (fellow citizens).[3] Every one familiar with the national-socialist application of these conceptions understands that the moral duty which the new Act has transformed into a legal obligation exists not towards human beings in general, but exclusively towards those who happen to conform with the official Nazi policy. The Act can therefore only be regarded as one of the many attempts to legalize a false system of morality.

But quite apart from this particular weakness arising out of Nazi mentality, legislative attempts of this kind can only confirm the old-established principle that mere *omissions*—immoral as they be—are generally

[1] Jeremy Bentham, *Introduction into the Principles of Morals and Legislation*, Part II (1823), p. 255 fn.

[2] Kenny, *Outlines of Criminal Law*, 14 ed., 1933, pp. 9 and 22.

[3] Pfundtner-Neubert, *Das neue deutsche Reichsrecht.*

unsuitable objects of penal legislation. It is not our aim to make any kind of immoral behaviour an offence, but rather to secure the immunity of actions which are not wrong from the moral point of view. Nor does it necessarily follow from our premises that the legitimate purpose of punishment is moral retribution, and, still less, severe retribution. Mr. Leo Page is undoubtedly right in his fight against such an interpretation of the objectives of punishment.[1] But is the retributive attitude really the inevitable result of the demand that the machinery of the criminal law ought to be used exclusively against actions which are indefensible not only from the legal, but also from the moral point of view? Neither logically nor practically does such a retrograde step seem to become necessary. On the other hand, the possibilities of reformatory treatment could be greatly enhanced and its persuasive powers strengthened, if its application were to be restricted to suitable cases. And certainly, as will be pointed out at a later stage,[2] moral stigmatization is never an appropriate ingredient of penal methods, even as a reaction against distinctly immoral actions. There is at present too much moral stigma attached to the treatment of offences in spite of the theoretical gap existing between crime and immorality. The stigma ought to be eliminated, whilst the gap might be rendered narrower.

In addition to the need for re-examining the *ends* of punishment, we are faced with the fact that the essential parts of this institution have become somewhat obscured. Is it necessary, for instance, that punishment should be in itself an evil? A hundred years ago,

[1] Op. cit., pp. 64 et seq.
[2] See below, Part II.

Feuerbach proclaimed the principle that a penalty which the offender himself desired must not be imposed on him, and consequently the Bavarian Draft Code of 1810—as already the Prussian *Allgemeines Landrecht* of 1794—provided that the death penalty had to be commuted into life imprisonment if the murderer had committed the crime only in order to be executed.[1] Murders of this kind were not at all exceptional in the seventeenth and eighteenth centuries. As the longing for death was fairly widespread and, on the other hand, the fear of eternal penalties prevented many from suicide, the only solution seemed murder.[2] At present the idea that punishment, as administered by the State, must necessarily be an evil, is more or less abandoned. There are often no longer any noticeable differences between methods of treatment which fall under the conception of punishment and other methods. In former times punitive treatment was, by its severity, usually distinguishable from non-punitive measures. To-day the complaint is often made that such *outward* characteristics no longer exist. The gradual disappearance of the old walled fortress type of prison is symbolical of the breakdown of the barriers between penal and other institutions. Occasionally, however, there may no longer be any differences even in the *intention* behind the application of penal and non-penal measures. A well-known modern expert[3] argues, for instance, in support of the penaliza-

[1] See P. J. A. von Feuerbach, *Lehrbuch des Peinlichen Rechts* (14 ed., 1847), § 137.

[2] See the material collected by H. von Weber, *Monatsschrift für Kriminalbiologie und Strafrechtsreform*, 1937, pp. 161 et seq.

[3] Dr. W. Norwood East, *Medical Aspects of Crime* (1936), pp. 142–3.

tion of attempted suicide that it might sometimes be somewhat disadvantageous to would-be suicides to abolish this offence, because "the patients have an opportunity to recover their normal emotional level with the assistance of rest, good food, quiet and medical attention in the prison hospital," because prison visitors or charitable organizations may find employment for them, because "the prison hospital is the only institution where care, control and treatment can be enforced at a period . . . when it is absolutely necessary; for, . . . the majority cannot be certified as insane, and some would not remain under treatment, voluntarily, in a mental hospital." There is no reason to doubt the accuracy of these statements; it ought, however, to be made as clear as possible that by accepting them as a basis for the present attitude for the penal law we are adopting a conception of punishment which replaces the old idea that even a reformative method of punishment must be an evil by the other conception that it may be a purely beneficial treatment.

In addition to this problem of defining the very meaning of crime and the very functions of punishment —as contrasted with social phenomena of a fundamentally different character—Penal Reform has to face the undeniable fact that its whole field is permeated by fundamental inconsistencies, a fact which makes it so difficult to pursue a consistent policy. It is a commonplace to say that the treatment of the lawbreaker is a matter of the greatest concern not only to the penologist, in the strictest sense of the word, but also to the student of social science and sociology, to the lawyer and the politician, as well as to the moral philosopher and educationalist, to the psychologist and psychiatrist. All of them are equally indispensable, and it is only

through their harmonious co-operation that Penal Reform can be achieved. It is, however, also a commonplace that we can hardly expect all members of such a mixed team to have identical views about the aims of Penal Reform and the best ways and means of achieving them. Frank discussion of the existing divergencies would seem to offer the most promising prospects for the gradual shaping of a uniform policy, and for an effective attempt to mould public opinion, which is still the strongest of all factors in Penal Reform. It is for this reason that the author proposes to examine in the following chapters the relations between some essential features of the penal problem on the one hand, and, on the other, such considerations of a social and economic, legal and political character as are particularly likely to lead to clashes of opinion. As point of departure may be chosen the basic principle of modern Penology that punishment, in order to be effective, has chiefly to aim at reformation, and that this aim can only be achieved by individual treatment of the lawbreaker. This does not mean that elimination of the lawbreaker and deterrence can be entirely neglected; for certain types of offenders and offences they will probably remain indispensable. But for the great majority of them reformation is certainly an aim that should at least be pursued. Whether we interpret the term "reformation" mainly in a moral sense or more in the sense of "training for citizenship," in any case it can only mean that every possible attempt should be made to strengthen the faculties of the offender and his powers of resistance against the danger of relapse. Certainly, to achieve this aim is not easy in itself—even if all the existing material and spiritual forces that are at work within the community united

and combined their efforts. The position may however sometimes become more serious if there are present certain, perhaps unconscious, but nevertheless real tendencies and traditional prejudices, which, by their very nature, work in a direction entirely opposed to reformation and individualization. As already indicated, such opposition may come from certain social and economic sources, but it may also have its origin in considerations of a legal or political character. The investigation of these factors may, at the same time, contribute a little towards the solution of the problem whether the historical development of penal methods runs parallel with other dominant tendencies in the development of human civilization, or whether it has mainly followed its own rules. For certain periods of history, as, in particular, for the Age of Enlightenment, a close connection between the development of penal methods and the general trends of civilization has already been sufficiently established, whilst for many other periods there are still wide gaps to be filled.

PART I

THE ECONOMIC DILEMMA OF PENAL REFORM

CHAPTER II

THE ROLE OF THE ECONOMIC FACTOR IN PENAL HISTORY

WHAT is the nature of the *economic* factor in the penal problem and in Penal Reform? To state our problem as clearly as possible: we concern ourselves not with the economic causes of *crime*, but with the economic implications of *punishment*. Such implications may assume three forms: in the first instance, the origin of penal methods, such as deprivation of liberty, transportation, fines, and even capital punishment, may be traceable to considerations of an economic character; secondly, the way in which the administration of the penal system is carried out may depend upon the economic position of the country in general; and, vice versa, penal methods may themselves have important effects on the economic life.

Such are the possibilities. It is our task to see how far they have become actual facts in history. Statements of a rather sweeping nature have sometimes been made in this respect. This was bound to happen as a consequence of the materialist interpretation of history. It was almost inevitable that, at a certain stage of the development of penological thought, the contention had to be made that there had been no change in the world's penal methods that were not capable of a purely economic explanation. To express the theory in the simplest terms: Penal problems, according to this hypothesis, have been solved and will continue to be solved not in conformity with criminological and penological factors, but according

to economic expediency. Whether a given country at a given time resorts to imprisonment in preference to capital punishment, or to transportation in preference to mutilation, or to probation and fines in preference to imprisonment, whether it adopts a stricter or a more lenient course in the prison administration itself—the answer to all these and many similar questions depends on the state of the slave trade and the labour market rather than upon humanitarian principles. If there is a scarcity of labour, with correspondingly high wages, it is uneconomical to execute the working classes, instead of leaving them at large as free labourers or of employing them profitably in the prison workshop. If, however, there is a large surplus of unemployed labour, demoralized by economic misery, prison will lose its efficiency as a deterrent, unless its severity surpasses even the wretchedness of the slums.

A few years ago the attempt was indeed made to interpret the whole trend of the history of penal methods so as to fit into this theory.[1] In the history of penal methods—it has been said—there are four stages which clearly demonstrate this close interdependence of penological developments and economic factors: First, the composition system of the early Middle Ages; here we are shown the type of an agricultural economic society in a sparsely populated country, where all hands are needed for work in field and farm. Consequently, imprisonment as a penalty was almost

[1] Georg Rusche, *Arbeitsmarkt und Strafvollzug* (*Zeitschrift für Sozialforschung*, Vol. II, 1933, pp. 63 et seq.).

Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (Columbia University Press, 1939), was published after this had already gone to press.

unknown at this stage, and everything had to be settled by payment of a composition in money or in kind, technically impossible as it then was to invent such a kind of work as could be performed in a closed institution.

When, however, the later Middle Ages saw a considerable growth of the population—followed by social crises, economic misery and an enormous rise of crime against property—there came into being the ill-famed system of cruel penalties with its horrors of capital punishment and mutilation. The lowest strata of society, from which emerged the majority of criminals, required harsher methods than a composition system.

Exponents of this theory regard the year 1600 as the beginning of the third period. The discovery of new continents in the fifteenth century in connection with prolonged wars, plagues and famine had resulted in a great decline in the European population, which made a more humane treatment of the criminal classes unavoidable. Hence the beginning of prison reform in England and Holland at the end of the sixteenth century, a stage which, however, did not last long, as the Industrial Revolution of the eighteenth century soon began to upset the whole economic situation. With the coming into existence of a new army of unemployed, the reformatory spirit of the early English Bridewell, this precursor of the Dutch *Zuchthaus*, was doomed, and its place was taken by the treadmill and the crank and, above all, by a new wave of death sentences. Even the American invention of strictest solitary confinement—on the surface of it an outcome of the humanitarian and religious ideas of Quakerism—was, if one follows this theory, in fact

simply intended to offer a deterrent to those poorest classes of the people who had become too much hardened to privation to be sufficiently deterred by ordinary prison life. If the various American penal systems of the later nineteenth century were, nevertheless, somewhat more lenient than the contemporary European ones, the simple explanation—so we are told—lies in the fact that the American economic system was in greater need of human labour.

Fundamental developments in penal methods have no doubt often been due mainly to economic factors. Nevertheless, if we look more closely into the matter, we find that it was usually something more than mere economic influences that brought about a particular change. And, on the other hand, we may encounter many occurrences that show no connection whatsoever with such factors.

In support of this perhaps a few examples may be quoted taken from the principal turning-points of penal history.

(1) It is surely one of the greatest miracles of the history of penal methods that primitive people should have agreed to renounce the right of vengeance and blood feud in favour of *compensation* in money or cattle. Measured according to modern standards it is, of course, far from surprising that the injured party should be willing to compound a felony—"the most obvious method of putting a stop to the feud," as Sir William Holdsworth[1] calls it. This complaisant attitude seems, however, to be somewhat at variance with the psychology of primitive mankind, and we can well understand

[1] *History of English Law*, Vol. II, p. 44.

why Professor Jenks,[1] though conjecturing that "Christianity, with its hatred of bloodshedding," may have had something to do with it, has confessed to be "in the dark as to the origin of the change." Legal historians and anthropologists have tried to explain away the metallic flavour of the old compensation system by pointing out that such payment, far from being regarded as compensation only, was in the first place a sign of apology, humiliation and atonement, coming not only from the individual lawbreaker himself, but above all from his group.[2] Others think that this evolution was closely connected with the development of the idea of individual property, which brought to the surface the passion of avarice that proved as strong as vindictiveness,[3] whilst Noyes[4] seems to regard such property rather as a consequence of "the customary claim of the wronged to the person, or body, of the wrongdoer . . . or in default of that to vengeance or the price of forbearance." Sir Henry Maine maintained that the composition system had in fact nothing to do with the penal law and rather belonged to the realm of civil torts.[5]

The interest of the State in the promotion of peacemaking by composition instead of blood feud was obviously also twofold: the ideological interest in the

[1] Edward Jenks, *Law and Politics in the Middle Ages*, 1898, p. 102. As to the influence of the Church, see also H. Brunner, *Deutsche Rechtsgeschichte*, Vol. II (1892), p. 608.

[2] See, e.g., Sir James Frazer, *The Golden Bough*, Vol. 3, "Taboo," p. 187; F. Znaniecki, *Social Actions* (1936), p. 372.

[3] Julius Makarewicz, *Einführung in die Philosophie des Strafrechts* (1906), p. 263.

[4] C. Reinold Noyes, *The Institution of Property* (1936), pp. 160 et seq. See also Diamond, *Primitive Law*, pp. 285 et seq.

[5] Sir Henry Sumner Maine, *Ancient Law* (1930 edition), p. 391.

avoidance of bloodshed as well as the economic interest in getting the peace money, the *fredus*.[1]

The impact of a penal system upon the economic life of the community has probably never since been so deeply felt as in those days when, especially in the Teutonic world, owing to the wide scope of the penal laws and the enormity of their tariffs, poverty or wealth of whole families were frequent consequences of wrong-doing.[2]

The interpretation of changes of this kind was much simpler for the Bolshevist philosopher of the pre-purge period than for the bourgeois student of penal history. To Pashukanis and his followers, the essence of bourgeois penal law lies in its connection with the economic principles of free trade and exchange of goods of equal value on the open market by private individuals.[3] It is this idea of barter, of exchanging equivalents, that has brought about the displacement of blood feud by

[1] See on composition in general, Julius Goebel, *Felony and Misdemeanor*, New York, The Commonwealth Institute, 1937, pp. 21 et seq.

[2] See H. Brunner, *Deutsche Rechtsgeschichte*, Vol. I (1887), p. 206; K. Th. v. Inama-Sternegg, *Deutsche Wirtschaftsgeschichte bis zum Schluss der Karolingerperiode*, second edition, 1909, p. 204; on the other hand, A. Dopsch, *Wirtschaftsentwickelung der Karolingerzeit*, Vol. II (1913), p. 2.

[3] For the following text, see John N. Hazard, "Reforming Soviet Criminal Law," *Journal of Criminal Law and Criminology*, Vol. XXIX, p. 157 (July–August, 1938); H. Donnedieu de Vabres, *La Politique criminelle des Etats autoritaires* (Paris, 1938), p. 160; H. Freund, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 51, p. 301; Reinhart Maurach, *Grundlagen des räterussischen Strafrechts* (1933), p. 64; Maurach, *Zeitschrift für osteuropäisches Recht*, Vol. III (1936–37), p. 737; S. Dobrin, *Law Quarterly Review*, Vol. 52 (1936), p. 414; Rudolf Schlesinger, *Zeitschrift für Sozialforschung*, Vol. VII (1938), pp. 388 et seq.

the principle of talion or later by the payment of money compensation. According to this theory, the present "price-list" character of the penal law will not finally give way before the complete destruction of the economic foundations of the bourgeois community, whilst in a socialist society crime will disappear even without the permanent pressure of punishment. Pashukanis' downfall in 1937 is said to have mainly been due to the conviction that his thesis of the complete subordination of crime and penal methods under the ruling economic principles had caused him to assume a too fatalistic and defeatist attitude towards crime. The coincidence of certain penal methods with bourgeois economy is now believed to have been more a matter of chance than of any causal relationship, and self-defence as the basic idea of punishment is now regarded as indispensable whatever form the political organization and ideology of the State may assume.

The gradual *collapse* of the composition system was due to changes in the conditions that had been responsible for its coming into being: The Church had undertaken its fight against the barbarity of the old penal system not only because "ecclesia abhorret a sanguine," but also for the special reason that the original death penalty bore chiefly the character of a religious ceremony, and, therefore, fighting capital punishment meant fighting the old gods. When this motive had lost its power and when, moreover, the Church dignitaries began to participate in the worldly business of the State, their opposition to barbarous penalties weakened.[1] Moreover, the impoverishment of large classes of the population made it impossible to enforce the composition system, and other, non-

[1] See H. Brunner, *Deutsche Rechtsgeschichte*, Vol. II, p. 608.

economic forms of punishment had to be found.[1] "The bill that a man-slayer ran up," says Maitland,[2] "became in the days of feudalism too complex to be summed, too heavy to be paid. . . He had to pay with his eyes or with his life a debt that he could not otherwise discharge." Corporal penalties and banishment had to take the place of the composition system, because almost the only worldly goods that had been left to the great masses were their bodies and, perhaps, their citizenship.[3]

(2) If the penologists of that age had been capable of acting according to the rules of economic prudence, it might have been more profitable to have lowered the tariffs, to have invented some sort of Dawes Plan so as to make payment again possible. Instead of doing so, the Church, having failed to save the composition system and shocked by the new methods that succeeded it, established a system hardly less clumsy, but at least less cruel: the institution of *Sanctuary and Abjuration*, which dominates the period from the thirteenth to the sixteenth century.[4] The criminal who takes refuge in a sanctuary loses everything he possesses except his life; civilly, he dies and has to abjure the

[1] See J. Goebel, *Felony and Misdemeanor*, p. 201; on the other hand, Krawinkel, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 58 (1938), pp. 462 et seq., who denies that economic factors were responsible for the breakdown of the composition system. See, moreover, Henri Pirenne, *Economic and Social History of Medieval Europe*, p. 81.

[2] Maitland, *Collected Papers*, Vol. II, p. 427.

[3] See, e.g., G. Bohne, *Die Freiheitsstrafe in den italienischen Stadtrechten des 12. bis 16. Jahrhunderts*, Vol. I (1922), pp. 25 et seq., pp. 169 et seq.

[4] Holdsworth, Vol. III, 303 et seq.; Rudolf His, *Das Strafrecht des deutschen Mittelalters* (1920), pp. 405 et seq.; T. F. T. Plucknett, *A Concise History of the Common Law*, second edition, 1936, p. 382.

realm. Once more, however, the effects of the economic and social changes make themselves felt: banishment begins to lose its terrors and the loss of valuable manpower through abjuration becomes rather unpleasant to the country of origin.[1] There can be little doubt that outlawry, one of the most frequently used penal methods of that age, was at the same time thoroughly uneconomic. It is, moreover, rather annoying to observe how little the Middle Ages were even capable of using, in suitable cases, the wonderful economic opportunities of banishment which are now so well understood. Instead of a profitable process of "Aryanization," or whatever it might have been called, they stupidly preferred to burn or otherwise destroy the whole property of the banished (the German *Wüstung*)[2] —and there was then not even the insurance money that could have been confiscated. Surely Huizinga[3] is right when he stresses the tremendous formality in medieval thought and, in particular, the formal element in everything connected with vengeance and expiation. The secret of how to combine formalism and economic utility in penal administration had not yet been sufficiently discovered.

(3) At the time when the composition system fell into disuse there arose, in some countries, another form of punishment which satisfied if not the economic so at least the military needs of the Government: condemnation to the *galleys*, this precursor of the later press gangs. So great was the influence of these

[1] Holdsworth, loco cit.

[2] See R. His, *Das Strafrecht des deutschen Mittelalters*, pp. 421 et seq.; J. Goebel, op. cit., pp. 100 et seq.

[3] J. Huizinga, *The Waning of the Middle Ages* (English edition, 1924), p. 213.

military needs of the naval powers that at last, according to a decree of Charles IX of France of 1564, the length of a sentence was to be fixed at not under three years, because this was supposed to be the minimum required for the necessary training.[1] In the seventeenth century, in order to secure sufficient crews for the galleys,[2] the French Courts were ordered to refrain as much as possible from imposing other penalties.

(4) The origin of the *Transportation* system and its subsequent breakdown, especially with regard to Australia, seem at first glance mainly due to economic factors. This scarcely needs proving at any length. The Act of 1717 (4 Geo. I, c. 11) itself stated in its preamble explicitly as one of the reasons for transporting criminals to America "the great want of Servants" in His Majesty's colonies and plantations, and the first large shipment of convicts after the Restoration was sent to Jamaica upon the petition of the merchants there.[3] And are not similar considerations at the bottom of the earliest French, Dutch, Spanish and Russian Transportation systems?[4] "Peopling the Empire," was the slogan in all countries with vast and almost uninhabited colonial possessions, and if this aim could not be achieved with free settlers,

[1] See G. Bohne, op. cit., Vol. II, pp. 302 et seq.

[2] See Sutherland, *Principles of Criminology* (1934), p. 311.

[3] See Abbot Emerson Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century," *American Historical Review*, Vol. 39, p. 244.—Professor Edward Jenks, *The New Jurisprudence* (1933), p. 127, points out that transportation to America began "long before the great outburst of humanitarian feeling aroused by the teachings of Voltaire and J. J. Rousseau."

[4] See, e.g., Maurice Thamar, *Les Peines Coloniales et l'experience Guyanaise* (1936), p. 69; J. Y. Foinitzki et Bonet-Maury, *La Transportation russe et anglaise* (1895), pp. 150, 162, 224 and passim.

the convict had to make his contribution. There was, moreover, the old fear that England had become over-populated. As already indicated, there have been attempts to explain certain tendencies in the development of penal methods in terms of population movements and conditions, i.e. to maintain that certain population movements have invariably led to corresponding reactions of a penal character. And it is certainly tempting enough to link the Transportation system with the name of Malthus. Actually, however, Transportation to Australia began at a time when there was, in this country, still a strong belief that the population was decreasing.[1] In a Report of 1796, for instance, the old idea is upheld that "all convicts and settlers sent out represent so much labour lost to the mother country."[2] It was only after the publication of Malthus' first edition in 1798 and after the Census of 1801 that public opinion took another trend.[3]

Nevertheless, even without any Malthusian ingredients there is ample material to prove the strong economic flavour of Transportation. To the contractors it was a source of profit, and so it was to the parishes, as the system seems to have sometimes been used in order to get rid of the "disordered and helpless" who threatened to become a burden to the ratepayer.[4] Last, not least, in spite of Jeremy Bentham's efforts to

[1] See, e.g., James Bonar, *Malthus and His Work* (1885), p. 178 (George Allen & Unwin); G. Talbot Griffith, *Population Problems in the Age of Malthus* (1925), p. 90.

[2] *Report of Select Committee on Finance*, 1796, quoted by Eric O'Brien, *The Foundation of Australia* (1937), p. 349.

[3] See A. M. Carr-Saunders, *The Growth of the Population of Europe*, in *European Civilization, its Origin and Development* (ed. by Edward Eyre), Vol. V (1937), p. 360.

[4] See Eric O'Brien, *The Foundation of Australia* (1937), p. 244.

prove the advantages of his Panopticon scheme,[1] Transportation was held to be less expensive than the erection of big cellular prisons, as favoured not only by Bentham himself, but also by Howard and Blackstone.

The task of disentangling the various factors that put a stop to the use of Australia as a penal colony is more complicated. Was it the excessive costliness of the system that showed itself more and more, or was it the gold discoveries with the consequent influx of free immigrants that made transportation there too attractive?[2] Or was it, on the contrary, the growing difficulties of finding employment for the ticket-of-leave men in the colony?[3] Was it the "crusade of the Wakefieldians against the use of convicts as bed-fellows of their free labourers,"[4] or the inherent weakness of the sociological structure of a convict community, the growing opposition of the free immigrants in Australia, or the untiring agitation of Archbishop Whately and other humanitarians in the mother country against "Secondary Punishment?"[5] Impossible as it probably is to allocate to each of these elements its relative share, one can hardly be very wrong in saying that economic and non-economic forces were both responsible for the final breakdown.

The most recent attempt made by the Spanish Government in 1933 to revive Transportation to

[1] See his *Panopticon versus New South Wales* (1812).

[2] See R. C. Mills, *The Colonization of Australia* (1915), p. 280; T. A. Coughlan, *Labour and Industry in Australia*, Vol. I, p. 554.

[3] See Sir Evelyn Ruggles-Brise, *The English Prison System* (1921), p. 24.

[4] W. D. Forsyth, *Governor Arthur's Convict System* (1935), p. 106.

[5] See Richard Whately, *Thoughts on Secondary Punishment in a Letter to Earl Grey* (1832), and *Remarks on Transportation* (1834).

Spanish Colonies—an attempt which has remained abortive on account of the outbreak of the Civil War —also appears to present a curious mixture of penological and economic considerations. The official commentary gives the usual explanation that Transportation is the best method for the protection of society and the reformation of the criminal. At the bottom of the experiment, however, seems to have lain the insuperable difficulty of finding suitable work for prisoners at home in a period of unemployment and in the face of the opposition of free labour. Hence, this last plan to send convicts to the Spanish possessions in West Africa where it was thought they would perform productive work without disturbing the general labour market.[1]

(5) To the historian of penal methods there can hardly exist a more fascinating problem than that of the origin of the idea that *imprisonment* should be used as a *penalty in itself*. For centuries mankind had been accustomed to regard imprisonment as nothing but a preparatory stage for the infliction of other penalties. Prison was a place of safe custody for keeping accused persons on remand before trial.[2] It is useful to remember this fact, because it may make it easier to many minds to reconcile themselves to the inevitable if imprisonment should again fall into disuse. But how did that idea ever arise? There are some writers who seem indeed to think that imprisonment as a method of

[1] See the criticism of the Spanish scheme by W. Gentz, *Monatsschrift für Kriminalpsychologie und Strafrechtsreform*, Vol. 24 (1933), pp. 300 et seq.

[2] See, e.g., George Ives, *History of Penal Methods* (1914), pp. 13, 40, and passim; Guenter Seggelke, *Die Entstehung der Freiheitsstrafe* (1928); G. Bohne, op. cit.

punishment owes its origin to the economic consideration that the prisoner's labour might represent a prolific source of revenue for the State.[1] True as this may be for certain later periods, it can hardly apply to the origin of the prison system, for the simple reason that early prison administrators never thought of making any systematic use of their prisoners' working capacity. On the other hand, it seems fairly evident that many other forces of a non-economic character have been responsible for the building up of a prison system. It was the example of the Church, which had long been using imprisonment as an instrument of punishment against heretics and rebellious priests.[2] It may also have been an inevitable consequence of the right of sanctuary or of imprisonment for debt. Another interesting suggestion has been brought forward in connection with Oswald Spengler's theory of the birth of a modern *Zeitgefühl*, i.e. appreciation of the value of time, a suggestion which, if acceptable at all, would work more in a negative than in a positive way. Neither antiquity nor the early Middle Ages, according to Spengler, possessed this feeling, and it was the invention of the weight-driven clock between 1000 and 1200 that Spengler regards as the symbol for the birth of the idea of time.[3] How far can this event be held responsible for the coming into being of a method of punishment that, like imprisonment, is chiefly to be measured on the basis of time?[4] It is

[1] See, e.g., G. Rusche, *Zeitschrift für Sozialforschung*, Vol. II (1933), p. 69.

[2] See G. Ives, op. cit., p. 40; G. Bohne, op. cit., Vol. I, p. 232.

[3] See Oswald Spengler, *Der Untergang des Abendlandes*, Vol. I (seventh to tenth edition, 1920), pp. 10 et seq.; Vol. II (1922), pp. 289 et seq.

[4] G. Bohne, op. cit., Vol. I, pp. 66–7.

certainly a curious coincidence that prison, as a penal institution, was first used at approximately the time of the first modern clocks.[1] How strongly modern prison as an instrument of punishment is dependent upon the conception of time may be proved by the usual failure of the film to give a true idea of what imprisonment really means. It is easy to give a picture of the horrors of antiquated methods of punishment, but how can the film ever succeed in showing the effects which a long-term sentence must have on a prisoner in spite of the most humane treatment? Here we once more realize the truth of Lessing's thesis that there are certain limitations set to every branch of art, and that even Laokoon cannot for ever stand crying aloud on his pedestal. Not until the cinema technique will have learned from Strindberg's *Dream Play* how to represent the simple process of the gradual approach of age—not until then will the modern prison film be born.[2]

So much for the economic aspect of the *origins* of imprisonment. If we want to follow the problem up to the present day, it may be advisable to select some of the principal events in prison history for a closer investigation. Economic considerations or humani-

[1] As to the history of the clocks, see Lancelot Hogben, *Science for the Citizen* (1938) (George Allen & Unwin), pp. 32, 60, 228 et seq. Compare, for instance, Hogben, p. 231: "Till about A.D. 1450 they (i.e., weight-driven clocks) were not sold for secular use except for installations in public buildings. . . . Spring-driven portable watches—the so-called 'Nurenberg eggs'—were marketed at the beginning of the sixteenth century," and His, *Strafrecht des deutschen Mittelalters*, pp. 556 et seq.: very limited use of imprisonment up to the fifteenth century, except for ecclesiastical crimes.

[2] Similar aspects of the problem "Cinema and Crime" are admirably discussed in Mr. Edgar Dale's book, *The Content of Motion Pictures* (1935).

tarianism? How far have either of them been responsible for the changes in prison methods, and how far have they to be regarded as absolute contrasts? It has been said[1] that even John Howard's work "linked economic considerations with the humanitarian spirit," in so far as he believed that "the reasons for the necessity of prison reform would appeal alike to merchant, statesman and humanitarian." The need for further researches, not only into the psychology of the *criminal*, but also into that of the *penal reformer* is very urgent indeed.

(6) Prison in the *modern* sense, i.e. as an instrument not only for the safe keeping of the prisoner's body, but also for his reformation, came into existence sometime in the sixteenth century. Experts are, however, by no means unanimous in their choice of the country to which the honour is due of having first established prisons on reformatory lines. For a long time, Holland's claim seemed to be firmly established, not only by John Howard's commendatory references, but even more strongly by the notable researches of a German scholar at the beginning of the present century.[2] This writer drew the attention of the experts to the remarkable achievements of the first *Zuchthaus* in Amsterdam. Immediately after the War, another German scholar challenged this view by attempting to replace the Dutch theory by an Italian version.[3] In this—according to the almost general view—he conspicuously failed,

[1] Jay Barrett Botsford, *English Society in the Eighteenth Century* (1924), pp. 310–11.

[2] Robert v. Hippel, in the *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 18 (1898), and in *Deutsches Strafrecht*, Vol. I (1925), pp. 242 et seq.

[3] G. Bohne, *Die Freiheitsstrafe in den italienischen Stadtrechten des 12. bis 16. Jahrhunderts*, Vol. I (1922), II (1925).

although he was able to produce much interesting material from Italian sources. However, while this academic war was being waged with great noise, a third party arose and proclaimed the English priority based upon the fact that the first Bridewells had been established in this country some forty years before the *Zuchthaus* in Amsterdam. Elizabethan England, suffering from an economic and social crisis which had enormously increased vagrancy, begging and crime, at last resolved to stem the flood not merely by hanging and whipping, but by some sort of constructive and reformative remedy. This was the reason for the first London Bridewell.[1]

Without taking sides in this quarrel over priority rights, we may assume that these first English Reformatories as well as the Dutch *Zucht-und Spinnhäuser* owed their creation to humanitarian as well as to economic considerations. The story of the origin of the Amsterdam *Zuchthaus* is usually told in a more dramatic setting than the English one by reference to an individual case where the aldermen of the Dutch city are said to have refused to pass the death sentence on a boy of sixteen, with the consequent necessity of finding other methods of dealing with juvenile offenders.[2] However true this may be, it should not be forgotten that in Holland no less than in this country the time was ripe for new ideals. Alba had been overthrown, and a period of almost unparalleled prosperity set in. It is certainly not a matter of pure chance that the Dutch East India Company and the Amsterdam

[1] See Austin van der Slice, "Elizabethan Houses of Correction," *Journal of Criminal Law and Criminology*, Vol. XXVII (1937), p. 45.

[2] Van der Slice, op. cit.; N. H. Kriegsmann, *Einführung in die Gefängniskunde* (1912), p. 6.

Zuchthaus had their origin at almost the same time. Half a century later, Holland had become the principal trading, shipping and manufacturing nation in Europe,[1] and to use Professor Tawney's phrase, "the economic schoolmaster of seventeenth-century Europe."[2] It was only natural that she should use some part of her new liberty, power and wealth to become also its social and penological schoolmaster.

The humanitarian wave extended to Germany where several similar *Zuchthäuser* were built in the course of the seventeenth century.[3] The general impoverishment caused by the Thirty Years' War, however, led to a definite deterioration in the administration of German prisons, whilst in Holland the former standard was still being upheld.[4] It was the *mercantilistic* ideas of the seventeenth century that had in their wake a new renaissance of the German *Zuchthäuser*. German Princes regarded it as a privilege to be allowed to maintain institutions of this kind. In 1687, the *Zuchthaus* at Spandau was established for the explicit purpose of promoting the woollen and silk industry there.[5]

(7) There is, however, at least *one* great event in prison history—and one of the most remarkable in the whole history of penal methods—that is definitely not capable of an economic interpretation. I refer to the introduction of *solitary confinement*. However critically one examines the huge amount of literature devoted

[1] See Herbert Heaton, *Economic History of Europe* (New York and London, 1936), pp. 272 et seq.

[2] R. H. Tawney, *Religion and the Rise of Capitalism* (Pelican edition), p. 185.

[3] See the dates given by Kriegsmann, op. cit., p. 6.

[4] R. v. Hippel, *Deutsches Strafrecht*, Vol. I, pp. 248–9.

[5] See R. v. Hippel, *Deutsches Strafrecht*, Vol. I (1925), p. 248, fn. 5; Frede, *Handwörterbuch der Kriminologie*, Vol. I, p. 540.

to this problem, it seems impossible to discover any economic motives in the minds of the men who invented, for instance, the Pennsylvanian system. Every aspect of solitary confinement proves it to be the most expensive and unproductive penal method the world has ever known, apart perhaps from certain experiments in transportation. Though it is wrong to say that at the Walnut Street prison the inmates were positively forbidden to work,[1] the Western Penitentiary of Pennsylvania, in any case for the first three years of its existence (1826-29), did not provide any employment at all.[2] Complete idleness has often been a feature of prison life, but it has either been a necessary evil or the result of cruelty or ignorance. In Pennsylvania it was part and parcel of a deliberate policy of reforming the criminal. Some of the many experts who, from all over the world, flocked together to study the miracles of the Eastern Penitentiary could not altogether conceal their perplexity at the costliness of the cell buildings and the impossibility of providing the isolated prisoner in his cell with productive work.[3] The idea of solitary confinement has never been the child of thrift. Sometimes it was used as an instrument of ecclesiastical discipline. In the Italy of the Renaissance it was favoured as an expression of class distinctions to separate the nobleman from his proletarian fellow

[1] See H. E. Barnes, "Economics of American Penology," *Journal of Political Economy*, Vol. XXIX (1921), p. 617; on the other hand, S. and B. Webb, *English Prisons under Local Government*, p. 115; Beaumont-Tocqueville, op. cit., p. 2.

[2] H. E. Barnes, *The Evolution of Penology in Pennsylvania*, p. 168.

[3] See, e.g., Dr. N. H. Julius on pp. xxvii et seq. of the Preface to his translation of Beaumont and Tocqueville's famous book, published under the title: *Amerika's Besserungssystem und dessen Anwendung auf Europa* (1833).

prisoner.[1] In eighteenth-century America its revival was entirely due to the religious zeal of Quakerism, just as the later victory of the Auburn system of separation by night and silent association during work was nothing but an acceptance of the simple logic of economic facts. The following bill has, for instance, been drawn up:[2] Cost of building per cell: Philadelphia: Thaler 2,374 (Solitary system); Sing Sing: Thaler 288 (Auburn system).

This, by the way, was not the first time that the Quaker State completely reversed its penal system for reasons of a distinctly non-economic character: its reception of the over-harsh English criminal law in 1718 in exchange for the much more lenient Quaker Code of 1682—one of the most retrograde steps in the history of penal methods—is said to have been due to the desire to secure from the Crown the right of affirmation in lieu of having to swear a judicial oath in Court.[3] It is most fascinating to observe the relationship between economic and religious factors in the later history of solitary confinement, and it is much to be regretted that neither Max Weber nor Professor Tawney have been able to devote a few pages of their masterpieces to this particular aspect of their great problem—they might have found it both stimulating and convincing. The student of this chapter of American penal history cannot fail to be impressed by the tactical skill which enabled some of the great prison reformers of the nineteenth century to achieve their religious

[1] See G. Bohne, op. cit., Vol. II, p. 180.

[2] Dr. Julius, loco cit.; see also Beaumont-Tocqueville themselves, p. 74, and Blake McKelvey, *American Prisons*, p. 29.

[3] See the interesting account by Professor H. E. Barnes, *The Evolution of Penology in Pennsylvania* (1927), pp. 36 et seq.

and humanitarian ends in a way profitable to the taxpayer.[1] This seems to be the substance of the contention, mentioned above, that the leniency of their methods was nothing but a consequence of labour scarcity.

To return to this country: one of the most progressive steps in English prison administration of the nineteenth century—the centralization of authority, carried out under the Prison Act of 1877—was largely the result of economic considerations. According to the Webbs,[2] this Act "was in fact made politically possible, not so much by the state of the prisons as by the successful campaign for a reduction of the local burdens on the rural landowner, farmer and ratepayer. . . ."

To sum up, then, this necessarily very rough sketch of some main events in penal history. Erroneous as it would be to interpret all changes on economic lines, it has nevertheless often been the weight of economic factors that has led to bold penological experiments, whilst, on the other hand, it has sometimes put a stop to penal methods that had too blatantly shown themselves at variance with the demands of economy. Penal history in general has shown little enthusiasm in voluntarily following the path of reason—economic or penological—but in the long run it has usually been forced to return to this path from its many aberrations.

What is the position to-day? We live no longer in the time of Mercantilism and do not hope to create

[1] See McKelvey, op. cit., pp. 12, 23, 38 et seq., 65, 93, 112.

[2] *English Prisons under Local Government*, pp. 198 et seq., 234. See also Sir Evelyn Ruggles-Brise, *The English Prison System*, p. 69; Kenneth Ruck in his edition of John Howard's *State of Prisons* (Everyman's Library), p. 295.

new industries or otherwise materially to influence the economic life of the country by prison labour. If nothing else, the great fall in the numbers of prisoners —at least in the more progressive States—would make this impossible. In a word, the community no longer expects any financial benefits from the penal system and is content if the latter does not make too great demands upon the resources of the State.

On the other hand, it is obvious that the question of expense must, as in every State Department, necessarily play its part in penal administration. "Tell me how much you spend on your penal system, and I will tell you what kind of penal system you have," certainly paints a fairly true picture. For money you can get high-class professional lawyers as chairmen of Criminal Courts, well trained and not over-worked probation officers, modern prison buildings, a sufficient number of Remand Homes and Observation Centres with full-time psychologists; for money you can do your After-Care work on a larger scale, and so on. When we read of the tremendous difficulties under which the prison services in most of the Balkan countries have to suffer,[1] we cannot fail to appreciate the full significance of the economic factor (though it is all the more astonishing that the very countries which are particularly anxious to maintain their penal institutions out of the profits of prison labour should nevertheless cling so obstinately to the old idea of solitary confinement with little or no work for a considerable part of the

[1] See the illuminating account of the Howard League Expedition to Eastern Europe, by Miss Margery Fry, Mrs. C. D. Rackham and Professor O. Kinberg: *Howard Journal*, January 1938.

sentence).[1] There are also, however, certain things which no country can get merely by spending more money, as, for instance, the enthusiasm that so visibly stood at the cradle of the English Probation, Borstal and Juvenile Court systems. On the other hand, no disparagement of the triumphal progress of Probation is implied in stating that its comparative cheapness has also been partly responsible for its popularity.[2] In New York, for instance, the costs of Probation, we are told, are only about the nineteenth part of those of imprisonment. Fines are sometimes said to be regarded with a favourable eye by local justices, since they represent a welcome contribution to their local funds.[3] To study the effects of an economic depression upon the use of fines might be as interesting as it is difficult because of the two opposing tendencies involved: reduction on account of the position of the offender, or increase owing to the financial needs of the community.[4] And lynching—if it can be regarded as a "penal method" at all: In an American book on the *Tragedy of Lynching*[5] we find that, as a rule, whenever the value of cotton increases, the number of lynchings goes down, and vice versa—cheaper cotton, more

[1] See *Howard Journal*, January 1938, pp. 10, 18, 22, 24.

[2] See Blake McKelvey, *American Prisons* (1936), p. 218. As Miss W. A. Elkin, *English Juvenile Courts*, pp. 96, 141, and 187, points out, the system of local administration of the Probation Service, including the payment of probation officers out of local funds, may sometimes have the unfortunate result that just in poor districts where the need for an efficient Probation system is most urgent, there is the least prospect of getting it.

[3] As to Soviet Russia, see Bertram W. Maxwell, *The Soviet State* (1935), p. 170.

[4] See Thorsten Sellin, *Crime in the Depression* (1937), p. 105.

[5] Arthur L. Raper, *The Tragedy of Lynching* (1932, Chapel Hill, The University of North Carolina Press), p. 30.

lynchings. Nevertheless, the predominance of penological considerations over the economic ones can now be taken for granted, although the dynamics of their relationship to each other may sometimes be liable to fluctuations. The post-War unemployment wave has *not* resulted in attempts to diminish the surplus of labour by brutal penal methods. There is *one point*, however, from which economic factors still dominate the whole penal system of our time—"economic" not so much from the treasury point of view, in its motives, i.e. merely for saving money, as in its consequences and because economy is here regarded as an essential part of penal policy itself. This is a reference to an idea of fundamental importance which in a sphere bordering on the land of Penology, namely the Poor Law, is well-known as the *principle of less eligibility*. There can probably be no more authoritative formulation of this principle than that given by Sidney and Beatrice Webb: "The Principle of 'Less Eligibility'"—they say —"that is, that the condition of the pauper should be 'less eligible' than that of the lowest grade of independent labourer—is often regarded as a root principle of the reforms of 1834."[1]

How could an idea so palpably evident and simple fail to impress itself upon the penal system?

It seems necessary to attempt to allocate to this principle its proper place in the whole system of penal policy. In particular, what may be its relation to the principle of deterrence? When deterrence as the chief aim of punishment became increasingly supplemented by the idea of reformation, public opinion, in harmony with many penal reformers, insisted that the new idea

[1] S. and B. Webb, *English Poor Law Policy* (1910), pp. 83 et seq., 260 et seq.

of reformation had somehow to be made innocuous, and this process of removing the sting from it was carried out largely by means of an application of the Poor Law principle of less eligibility to the penal problem. It was a simple and unquestionable *argumentum a fortiori* that here offered itself: if even the condition of the non-criminal pauper should be made less eligible than that of the worst-paid labourer, surely the criminal could make no claim for better treatment than the poor. It was probably regarded as the utmost limit of indulgence when this principle of less eligibility was sometimes exchanged for what I should call the principle of *non-superiority*, i.e. the requirement that the condition of the criminal when he paid the penalty for his crime should be at least not superior to that of the lowest classes of the non-criminal population. This is the formulation used by such an enlightened penal reformer as Jeremy Bentham. According to Bentham, every penal system should observe three fundamental rules:[1] Lenity, Economy, Severity, which latter means that "saving the regard due to life, health, and bodily ease, *the ordinary condition of a convict doomed to punishment, which few or none but individuals of the poorest class are apt to incur, ought not to be made more eligible than that of the poorest class of subjects in a state of innocence and liberty.*" Surely this was an important step forward. Whilst the principle of less eligibility still retains an element of deterrence for everybody, since its standard is below everybody's standard, the acceptance of the principle of non-superiority, on the surface of it, seems to eliminate the function of deterrence from the penal system at least for the lowest strata of society. Especially

[1] J. Bentham, *Panopticon; or The Inspection House*: Postscript, Part II (1791), p. 7.

with regard to prison reform, one can perhaps summarize the progress of civilization as mounting from the standpoint of deterrence pure and simple to that of reformation, restricted, first, by the principle of less eligibility, and later by that of non-superiority. This progress may, at the same time, be regarded as a changing-over from a purely psychological principle to an application of sociological ideas which requires the knowledge of objective standards, instead of more or less vague psychological hypotheses. The penologist who tests the efficiency of a penal system exclusively from the point of view of deterrence is more or less satisfied to regard his own personal reactions towards a certain method of punishment—occasionally somewhat modified by Criminal Statistics—as evidence of its quality as a deterrent, whilst the principles of less eligibility and of non-superiority require at least some knowledge of social conditions and of their valuation by the different classes of society. At the same time, they form a kind of link between the criminal and the non-criminal population, by circumscribing the social standing of the prisoner, if only in a negative way. The mere fact of being made the object of a comparison creates a link between both parties of the comparison. Thus, even by the application of the principle of less eligibility the criminal loses something of his isolation from the rest of the community—he is no longer a social Robinson Crusoe, an outlaw, he has become a recognized member of human society.

The progress of these two principles of penal administration has never been an easy one. They have had to steer the awkward middle course between the Scylla of overharshness and the Charybdis of permanent clashes with the Poor Law, the Dole and

other not too complaisant neighbours by creating prison conditions that might be better than conditions in adjacent territories. The safe path could obviously be narrowed on either side: Every *deterioration* in the economic conditions of the *population at large*, as well as every *improvement* in *prison conditions* was bound to lead to an approximation of the conditions to an undesirable equality, which, according to common belief, would result in an explosion and in the collapse of the penal department of the social fabric.

Even now, during the debates on the Criminal Justice Bill, it is becoming increasingly obvious that this old idea still represents the most formidable obstacle in the way of Penal Reform. It is for this reason that the following chapters will be devoted to an examination of the role which these principles play with regard to such problems as the standard of living to be observed in penal institutions, prison labour and the idea of economic self-responsibility in penal institutions. Moreover, their significance for after-care work and for non-institutional methods of treatment will have to be considered.

We shall then be able to proceed to a discussion of their *Social Implications*, i.e. to an examination of the losses in social status connected with the various penal methods. Finally, the conflict between certain implications of modern penological thought and some traditional principles of criminal law and procedure will require our attention.

CHAPTER III

THE ECONOMIC IMPLICATIONS OF THE PRINCIPLE OF LESS ELIGIBILITY FOR PENAL POLICY OF TO-DAY

It seems to be a task of considerable importance to investigate the part which the principle of less eligibility has actually played in the historical development of penal institutions and to examine carefully any justification it may claim for the future of Penal Reform.

Perhaps the best-known example of the alleged failure of a penological experiment through the violation of this principle is Transportation to Australia. When, after the Napoleonic Wars, the criminality rate in this country began to increase at an alarming pace,[1] the blame was laid largely at the door of the Transportation system, which was regarded as not sufficiently deterrent. The deterioration in the economic position of the English working classes as a result of the Industrial Revolution and the war, on the one hand, the gradual improvement of the lot of the transported convict, on the other, were made responsible for having upset the existing balance. What had been regarded as the

[1] See *Report on Criminal Commitments and Convictions of* 1827, p. 3:

Number of Commitments for trial in England and Wales:

	1806	4,346
	1816	9,091
	1826	16,147
Population:		
	1801	8,872,986
	1811	10,150,615
	1821	11,977,663

climax of cruelty when the system had been inaugurated, had now become almost a desirable change. This point of view was urged with special emphasis in the proceedings before the Select Committee on Criminal Commitments and Convictions which reported in 1827, and from this Report the idea gained entrance into the world literature of Penology.[1] The Report of 1827 contains, probably for the first time, the famous story of the Bedfordshire labourers: "Have you been able to detect a growing feeling on the part of the people themselves that the condition of the poor in this country, without employment and exposed to the vicissitudes of distress, is worse in itself than the condition of the convicts in New South Wales?" This was one of the questions which the Chairman laid before one of the principal witnesses who appeared before the Committee.[2] And the answer was: "I am sorry to say that a great part of the labouring population with which I am acquainted appear to think that their situation can hardly be made worse than it actually is. I saw a letter from a convict from New South Wales addressed to a friend in the village where he had lived in Bedfordshire, stating that he was now the owner of a considerable estate; that he had a great stock of cattle; that he served upon grand juries, and was in every respect comfortable; that a mutual friend of theirs, who had been transported with him, was also extremely comfortably situated; . . . that neither of them had any

[1] See, e.g., J. de Beaumont and A. de Tocqueville, *On the Penitentiary System in the United States and its Application in France*; translated by F. Lieber (Philadelphia, 1833), pp. 139–40; J. Y. Foinitzky et Bonet-Maury, *La Transportation russe et anglaise* (1895), p. 132.

[2] The Rev. Dr. Hunt, *Minutes of Evidence*, p. 37.

intention of returning to England, . . . and the impression produced by that letter on the minds of their former village acquaintances was that transportation was rather a benefit and an improvement of situation than a punishment." Modern penologists, with all the narrow-mindedness of which experts are sometimes capable, have expressed similar views even with reference to the former French penal colony, New Caledonia. One of them gets honestly indignant on discovering the daughters of a liberated ex-convict mounted on horseback galloping through the island: had their "old man"—so he complains—remained as a decent citizen in France, they would probably have had to walk modestly on foot.[1]

Apart from the special problems of transportation one must ask: What are the possible consequences of the principle of less eligibility (or of non-superiority) for the practice of Penal Administration and, in particular, what part does this principle play in a modern prison? It is obvious that, for the great majority of prisoners, a prison sentence can be made "less eligible" chiefly by curtailing the necessities of physical existence, as lodgings, dietary, etc. It is an old commonplace that in prison the food problem assumes an importance vastly superior to that which it plays in the life of even the most prosaically minded person at large. When we listen to the well-known complaints to be found in prison memoirs old and new, we can be sure that the majority of them are concerned with the problem of food. From older writers, as Friedrich von der Trenck, to Macartney and Mark Benney, the quantity of the bread, the consistency of the porridge, and the flavour of the cocoa become matters of utmost importance. No

[1] R. Heindl, *Der Gewohnheitsverbrecher* (1926), pp. 33 et seq.

one will be thoughtless enough to ridicule this only too well conceivable fact, but for us we have to consider the principle behind the complaints. Anything like a uniform policy of carrying the theory of less eligibility into effect was, of course, almost impossible in this country under the régime of the local justices before the centralization of 1877. There was no common standard of prison administration that could be used, particularly because the practice of allowing prisoners to support themselves in prison was not generally abolished before 1878.[1] The already quoted *Report on Criminal Commitments and Convictions of* 1827 gives a vivid impression of the difficulties in which the prison administrators of that time—at least to the best of their belief—found themselves as a result of the improvement in prison conditions after John Howard:[2] "Formerly a prison was dreaded on account of the filth and disease which were held to be its constant accompaniments. . . . It was discovered that this system was unwise as well as inhuman; that the prisoners became worse by contamination, while they excited sympathy by their wretchedness. Prisons were cleaned, ventilated, and put in order. But by making this change, a prison altered its character; men no longer dreaded being confined in a place where, under a good roof, and with good wholesome food, they were kept employed at labour less severe than their usual work. Hence it has become necessary to find some other means of inspiring dread; and it is this problem which has engaged the more sensible advocates of the new discipline of prisons for many years; for it need hardly be observed, although many seem to forget it, that it is

[1] See Dr. W. Norwood East, *Medical Aspects of Crime* (1936), p. 49.
[2] See *Report*, p. 15.

not solely the reformation of the offender which is desired . . . we wish to deter others from crime, and for that reason to make punishments irksome and disagreeable. . . . With respect to diet . . . the usual mode of living of labourers and artisans of the different counties is so very various, that it is not practicable, or expedient to adopt any strict uniformity of system. Still the difference now existing from 1/3 to 4/8 a head, per week, in expense . . . seems wider than any necessity can require." Nevertheless, soon afterwards several attempts were made to arrive at a general policy in this matter. Sidney and Beatrice Webb, in their masterly account of *English Prisons under Local Government*,[1] and recently Dr. Norwood East, the former Medical Commissioner of Prisons, in his excellent book on *Medical Aspects of Crime*,[2] have given us what might be called the history of the principle of non-eligibility with respect to the English prison dietary during the last hundred years. From their comprehensive studies of the subject the following facts are of special interest as illustrating the general line of development. It is apparent that here, as so often in penological matters, the views held by the responsible authorities were far in advance of public opinion. ". . . on this point"—write the Webbs—"the reformers had to reckon with a public opinion which suspected a tendency to pamper the prisoners." And: "It is due to the Home Office to admit that . . . it did not allow itself to be unduly influenced by popular clamour." In 1842, the Inspector of Prisons, in a special Report to the Secretary of State, suggested that "whilst due care should be exercised to prevent extravagance or luxury in a prison, the diet ought not to be made

[1] 1922, pp. 133 et seq. [2] See in particular pp. 50 et seq.

an instrument of punishment. . . ." This Report seems to have resulted in an improvement in the prison dietary, which, in its turn, appears to have caused a certain amount of uneasiness among some sections of the public. In any case, two years later, in the Inspector's Report of 1844 we find the statement that ". . . Among other evils foretold as the certain result of this interference with the food for prisoners, there is one more warmly insisted upon than others. I allude to the anticipation that by the adoption of these dietaries, or their equivalents, the situation of the convict as to food would be so superior to that of a considerable proportion of the humbler classes, that it would induce a preference for a prison, and thereby directly encourage crime. . . . But" (the Inspector goes on) "I am prepared to show that even if the morals of the people were as vitiated as apprehended, the quantity of food prescribed for prisoners by authority is no encouragement to crime, but directly the reverse. . . ." Twenty years later, the then Home Secretary caused an enquiry to be made by several medical Prison Officers into the same subject of prison dietaries. Their Report, submitted in 1864, is a most enlightened document. Among others, it contains the following truly remarkable sentences which deserve to be remembered in all future times as completely repudiating the whole principle of less eligibility and even that of non-superiority[1]: "It is extremely difficult to assertain what the ordinary food of free labourers is. Even if the enquiry was limited to that class of free labourers which is known to be the worst fed, namely, agricultural labourers, the true facts of the case would not be readily obtained. And even if it were to appear that,

[1] See Dr. Norwood East, op. cit., p. 52.

as a class, their food was badly chosen, badly cooked, and insufficient in quantity . . . it would not be incumbent upon us in framing dietaries for prisoners to imitate their bad examples or to conform ourselves to their exceptional circumstances. The duty which the authorities have to discharge in respect of the diet of the prisoners seems to us to be strictly analogous to that which they already perform in regard to other matters which involve their health and strength; and just as it would not be right to subject our prisoners to the dirt, overcrowding and defective ventilation to which the majority of them had been exposed when they were free, so ought it to be with their food. The quality and amount of it ought to be determined, not by the standard of any class of labourers, but by the actual necessities arising out of the prisoner's altered circumstances." Karl Marx—as some remarks in his *Kapital*[1] show—was rather perturbed by the statement he found in the *Report Relating to Transportation and Penal Servitude* of 1863 that the diet in English prisons was superior to that of ordinary English labourers.

A year after the establishment of centralized Prison Administration in 1877, the official attitude became again somewhat stiffer, in so far as a committee reported in 1878 that the object of prison administration was "to meet the just requirements of the prisoners without setting up attractions which would be likely to increase the number of committals."[2] Surely, this is as such a statement to which, in theory, no objection can be taken if we did not

[1] Karl Marx, *Capital* (English translation by Eden and Cedar Paul, 1928) (George Allen & Unwin), pp. 751–2; third German edition, 1883, pp. 701–2.

[2] See N. East, op. cit., pp. 84–5.

know that in practice it may sometimes mean a considerable deterioration in the standards of prison life.

That we are here face to face with a problem of universal importance may be gathered from the fact that the XIth International Penal and Penitentiary Congress, which met in August 1935 in Berlin, had on its Agenda the question: "In fixing the standard of life of the prisoners, must account be taken of the standard of life of the population in general?"[1] The Reports submitted to the Congress and the discussion of the problem may be easily accounted among the most illuminating parts of that ill-famed Congress. The differences of opinion are not only very marked; they are also truly representative of the present condition of Penology in the totalitarian States and the Democracies. The German thesis, which is stated to have differed the most from the English one, is almost exactly identical with Bentham's view of nearly a century and a half before:[2] "In principle, the prisoner's standard of life *should not be superior to that of the poorest citizen*, as it would be contrary to the spirit of justice if the free and honest, but unemployed citizen should be unable to enjoy, at least, the same standard of life as the prisoner."[3] At the other end of the scale stand the English and Norwegian Reports, which emphasize

[1] See *Proceedings of the Congress*, English edition, 1937, pp. 135 et seq., especially 149 et seq.

[2] Above, p. 57.

[3] See also Clara Leiser, "A Director of a Nazi Prison Speaks Out" (*Journal of Criminal Law*, Vol. 29, Sept.–Oct. 1938, pp. 345 ff.): "How is the food situation? According to existing instructions, that can be quite decent; it depends on the interest, views, and purposes of the particular director. Naturally it must under no circumstances be better than that of the unemployed or the lowest paid worker outside."

that "it is not the existence of the very poorest classes which should serve as a norm, nor that of persons on the dole, as these are cases which are due to special circumstances which every one would like to see abolished. . . ." The majority of the Reports "make it plain that the conditions under which prisoners exist *can in no way be compared* with those enjoyed by the free population, the loss of liberty entailing necessarily an external and internal organization of living conditions widely different from those allowed by freedom. For one thing, the prisoner can only participate to an infinitesimal degree *in cultural life*: unlike the free man *he has no possibility of finding compensation for the moral depression resulting from unemployment* by means of external impressions and by contact with the outside world. In the same way, the manner of living in prison is deeply influenced by the sole fact of a considerable number of human beings being gathered under one roof. It is therefore essential that a counterpoise should be found."

It is typical of the totalitarian atmosphere in which the Congress had to work that, in spite of the enlightened attitude of the majority of the States represented at the Congress, the Resolution adopted is such an obvious compromise as to be almost meaningless.[1]

The field of penal administration in which the principle of less eligibility had first to give way was, for obvious reasons, the treatment of the *young delinquent.* At the beginning of the present century, it was sometimes maintained that the conditions under which the

[1] See *Proceedings*, pp. 459–60: "In determining the *conditions under which the prisoner must live* the conditions of living of the free population must be taken into consideration. They must therefore be as simple as possible but so provided that the prisoner retains his health and working capacity."

inmates of Reformatory or Industrial Schools lived compared too favourably with those of non-delinquent children. Nor were such comparisons always completely free from bitterness. "In order now to get an industrial training, a boy has either to go to a Poor Law School or a Reformatory or an Industrial School," said a witness before the Committee on the Employment of Children, which reported in 1900. "He either has to be a criminal or a suspected criminal or a pauper." And: "In Industrial and Reformatory Schools there are generally ample means of physical training and recreation, and often well-organized games. In this respect children of the criminal or semi-criminal classes often fare better than do the children of the honest respectable workmen in large towns."[1] The recently published *Fifth Home Office Report on the Work of the Children's Branch*[2] has some excellent remarks on the present position, clearly showing the great progress made in this field within the course of the present century.

Having outlined the historical development and present position of the principle of less eligibility in penological thought, it now remains to search our minds as to our own attitude. One thing is perfectly clear: The question, as formulated for the discussions of the Berlin Congress, i.e. whether account ought to be taken at all of the standard of life of the population in general, this question is clearly to be answered in the affirmative. More than that, it should never have been so formulated. It is distinctly unwise to put questions that admit of only one answer. There is no social agency in the world, be it a prison or an army or a public

[1] *Report on the Employment of School Children,* 1901, p. 24.
[2] January 1938, p. 78.

school, an unemployment centre or a lunatic asylum that can possibly be run without due regard to the conditions of life prevailing among the population in general. To supply the inmates of an institution with a daily bottle of wine, whilst perhaps perfectly natural in Greece and Italy, would rouse storms of indignation in England or Germany. All these are matters which do not need any theoretical consideration, since they adjust themselves by the simple application of common sense and the amount of money available. The only real problem to be solved was and is whether this common-sense relationship should be replaced by rigid enforcement of an artificially contrived principle of less eligibility or non-superiority. As we have seen, there is a strong tendency amongst all progressive penal experts to discard those principles as much as possible. How far, however, can this go and how should it be done? With self-conscious air of embarrassment as though trying to excuse oneself and to placate public opinion, or boldly in the conviction that it is the only thing to do? I trust that, in the long run, the latter view will prevail and that public opinion will be won over, here as in so many other questions of penal reform. The old materialistic idea that prison conditions can be considered one by one and that each calorie of food, each cubic foot of air enjoyed by the prisoner should be compared and contrasted with conditions outside—such a method of dealing with the question has proved fundamentally wrong. No comparison is possible between social conditions that have no common factor. The whole existence of great masses of the population receives its vital stimulus mainly from that small margin of personal freedom that still remains to them after their daily work is done. When—

as in prison—this is taken away some substitute must be supplied to prevent wholesale deterioration.

In this matter it is obvious that there must exist a definite practical difference between totalitarian States and Democracies. When even the population at large enjoys but a poor measure of civil rights, the prisoner has very little freedom to lose. In such cases there is a strong temptation to make him feel his position by other means.

The democratic point of view, on the other hand, has been admirably expressed in the English Report for the Berlin Congress, where the chief emphasis is laid on the idea that "the privation of liberty is in itself the greatest of evils," and that "the State is in a position to achieve for the small number of prisoners what it is incapable of performing for the masses."[1] Prison experts from various countries have assured us that "the mere length of a sentence . . . is the greatest punishment which could be devised for any man except an imbecile."[2] "It is nonsense to think," states even a German Prison Governor in 1935, "that a short, harsh sentence is more dreaded than a long one without any severity."[3]

That the deterrent lies in the length of the sentence much more than in anything else can best be proved by the example of *Preventive Detention.* In every country that has introduced this method of treatment for professional offenders and other recidivists, there has been accepted the fundamental principle that, apart from

[1] *Proceedings*, pp. 152–3.

[2] The Governor of the Portsmouth Preventive Detention Prison in the *Annual Report of the Prison Commissioners for England and Wales for* 1936, p. 80.

[3] *Monatsschrift für Kriminalpsychologie und Strafrechtsreform*, 1935, p. 131.

their length, sentences of Preventive Detention should be carried out more leniently than other prison sentences,[1] Preventive Detention being not punitive in character, but merely intended for protection of society. The XIth International Prison and Penitentiary Congress of 1935 expressed the view that the treatment of persons sentenced to Preventive Detention "ought to be clearly distinct from that of individuals condemned to severe sentences of imprisonment," and that "differences might be made as regards the type of dress, the amount of the remuneration, the extent and choice of reading, and in other similar domains."[2] Here at once the following dilemma shows itself: If prison conditions in general are humane, how can Preventive Detention be made still more lenient without violating the principle of non-superiority? When in pre-War years the introduction of Preventive Detention was under discussion in Germany—at the time when the system was just being established in this country—some German penologists passionately opposed it by pointing out that the whole innovation would amount to nothing but a huge swindle, because the method of treatment in Preventive Detention Institutions would be in no way different from that in convict prisons. This certainly was an exaggeration. Though it may not have been easy, the English Prison Commissioners —as every visitor to Portsmouth Prison knows—have certainly succeeded in making their only Preventive Detention establishment more comfortable than a prison, without converting it into a Ritz Hotel.[3] "Non-

[1] See, e.g., *Report on Persistent Offenders* (1932), p. 22; Sir Evelyn Ruggles-Brise, *The English Prison System* (1921), p. 53.

[2] *Proceedings*, pp. 213 et seq., 578–9.

[3] See, e.g., Leo Page, *Crime and the Community*, pp. 206 et seq.

penal servitude" is the term suggested by Mr. Leo Page for this system. The inmates there enjoy amenities which many of them are not likely to have at home. Nevertheless, nobody will believe that a sane person may be tempted to commit a crime in order to be sent to Portsmouth.[1]

The new German system introduced by the Prevention of Crime Act of 1933 (*Gewohnheitsverbrechergesetz*), does not yet seem to have arrived at a satisfactory solution as to how to distinguish between the treatment of Preventive Detention prisoners and others. Theoretically, one might think that this task should have been made easier by the fact that the greater severity prevailing in German prisons and the greater number of prisoners should allow for a greater margin of differentiation and classification. Nevertheless, the practical experiences of the last five years seem to confirm the prognosis made by the present writer after the publication of the decree of May 14, 1934, providing the details for the carrying out of Preventive Detention: "It is questionable whether these differences (between both types of institutions) will be practically important enough to be appreciated by the inmates. . . . If the differentiation is imperceptible, then the transfer of the prisoners from prison to the Preventive Detention establishments would mean only a change of name, not of aim, and the whole double-track system becomes useless."[2] In a recent study by a German

[1] "Experience at Portsmouth"—writes a prison governor (*Report of the Prison Comm. for* 1937, p. 75)—"does not lead me to believe that a prison can become so comfortable that men do not wish to leave it, or are anxious to return to it."

[2] See *Journal of Criminal Law and Criminology*, Vol. XXVI, November 1935, p. 526.

writer on the practical working of the system it is admitted that there is no considerable difference between the execution of imprisonment and Preventive Detention, and that all those who had hoped to find a noticeably more lenient treatment in the latter institutions had to be disappointed. The author then makes an observation which is of immediate concern for our present attack on the principle of non-superiority. Alluding to the complaint made by members of the German *Arbeitsdienst* that they were set to work on reclamation of land side by side and under very similar conditions with men serving sentences of penal servitude or imprisonment, he stresses that forms of living which are very similar in their external appearance, nevertheless, may be open to entirely different social interpretations.[1]

It will be of great interest to see how far the standard of living in Preventive Detention establishments in this country will be affected by the changes proposed in the Criminal Justice Bill (clause 34), in particular by the very welcome abolition of the present double-track system which prohibits the sending of prisoners straightaway to Preventive Detention. At present, prisoners who invariably go to Portsmouth after having served at least a three years' sentence of penal servitude, arrive there in a mood that is probably far removed from that of a man who—as will be the case in future—comes to the institution immediately from the remand prison. The basis of comparison will then be a different one, and what to-day seems a relaxation may, in changed circumstances, be regarded as increased severity—although nobody, of course, will be sent to

[1] Sauerlandt, *Monatsschrift für Kriminalbiologie und Strafrechtsreform*, Vol. 29, 1938, p. 321.

Preventive Detention without any previous experience of imprisonment.

It is in the province of *Prison Labour* that the principle of non-superiority presents the key to an understanding of what is one of the most depressing aspects of the penal problem. Nowhere else has the inconsistency between penological progress and real or imagined demands of national economy become so glaringly unmasked. This is true not only of the fundamental problem whether prisoners should be given work at all, but also of the further question of *how* they should be employed.

The crude outlines of the dilemma are these: Certainly, prisoners—the word taken in its widest sense—should work. The man in the street, when remembering the taxes he has to pay for their upkeep, demands it, and the Court, in passing a prison sentence, pronounces it accordingly. The same man in the street, however, as soon as he begins to reflect not on his taxes, but on the difficulty of getting work to provide the necessary money for paying them, is very outspoken in his view that the products of prison labour should never be permitted to disturb the market by competing with the product of the free industry. Nor is this all. Trade Unions in many countries strongly object to the inmates of penal institutions even receiving such a training as might enable them to earn a living outside.[1] Such an opposition may well be justified in so far as it is grounded on the apprehension that the training in prisons or even in Borstal Institutions cannot be equal to ordinary standards and that its recognition would, therefore, constitute an act of injustice towards skilled workmen who have received their training in the

[1] Sanford Bates, *Prison and Beyond* (1936), p. 270.

ordinary course of apprenticeship. This was the attitude adopted by the General Council of the Trades Union Congress upon a question submitted to it by the Departmental Committee on the Employment of Prisoners in 1933.[1] The same Report, however, also reproduces the following reply made by an individual Trade Union: "My executive Council feels very strongly that it is grossly unfair that honest lads and poor citizens should be deprived of the opportunity of training and employment, whilst it is proposed that persons who have committed offences against the law and community are assisted in this connection. . . ." This is nothing but a restatement of the principle of less eligibility pure and simple in the form of a law of non-competition, which, by the way, does not even appear necessary from the economic point of view, since, in most countries, the numbers of prisoners have become too small to exercise a real influence upon the labour conditions. It may sometimes have been otherwise in the U.S.A. where the prison industries occasionally made themselves very unpopular by flooding the open market with masses of cheap products.[2] In general, however, the antagonism to any profitable employment and training of prisoners can be interpreted only in terms of mass psychology and suggestion. That it is a psychological rather than an economic stumbling-block that here bars the way of reason has long been recognized by penal administrators, and they have largely adapted their policy to that fact. The choice between the State-Use system—under which prisoners work exclusively under the direction of the

[1] See *Report of the Committee*, Part I (1933), p. 82.

[2] See, e.g., McKelvey, *American Prisons*, p. 221, and particularly Robinson, *Should Prisoners Work?*, pp. 61 et seq.

prison authorities and for the use of Government departments—and other possible systems of Prison Labour[1] has largely been influenced by the desire to appease public opinion. In the eyes of the public the State-Use system, by avoiding open competition, is less offensive, though from the economic point of view the actual difference may be insignificant. "In principle," it was stated in the *Report on the Employment of Prisoners*,[2] "the competition of prison labour with free labour is the same whether the articles made are for Government departments or for sale in the outside market, though (in the latter case) the effects of prison competition in the outside market are more obvious."[3] At the XIth International Penal and Penitentiary Congress in Berlin it was explicitly recognized that most of the usual complaints about the competition of Prison Labour are unjustified, but that, nevertheless, the psychological element of the matter has to be taken into account, "large numbers of people being convinced that the prisoners take away work from free and honest citizens, who are taxed in order to provide for the former's maintenance."[4]

Clearly, such misgivings are bound to come to a head in a period of economic depression, and it is interesting to see how the congregation of international experts assembled in Berlin at the height of the economic crisis tackled the problem. The following facts emerge very clearly from their discussions:[5] Complaints about

[1] See the admirable discussion of the various systems in Professor Louis N. Robinson's standard work, *Should Prisoners Work?* (1931).

[2] Part I, No. 141.

[3] See also Robinson, op. cit., p. 99.

[4] *Proceedings of the Congress*, p. 139.

[5] *Proceedings*, pp. 136 et seq., 457 et seq.

the alleged competition of Prison Labour are, for obvious reasons, particularly rife in times of economic depression. Such complaints are stronger in countries where prisoners are employed for private enterprise than in countries with the State-Use system; stronger where prisoners are engaged in industries than in agricultural labour. Consequently, in a country like the United States—burdened with much unemployment outside and a high percentage of prisoners engaged in industrialized work under the State-Account system, which allows the selling of the products in the open market[1]—the prison administration had to change their policy, with the result that the number of prisoners employed in the manufacture of goods for sale in the open market fell from 81 per cent in 1925 to 25 per cent in 1935.[2] In these circumstances it is not surprising that the Resolution adopted by the Berlin Congress, amongst other remedies, recommended: "Employment of more prisoners on public works, in particular on agricultural work, on the cultivation of unreclaimed land and similar works, due regard being taken of the interests of free labour. . . . Industrial occupation of prisoners is to be distributed on as many branches of industry as possible in order to avoid the evils of competition."[3]

The strongest exception must, however, be taken to the following recommendations: "No. 3: Replacement of machine work by hand work where this can be done

[1] See Robinson, op. cit., pp. 95 et seq.

[2] *Proceedings*, pp. 137, 163. Maurice C. Kaplan, *Journal of Criminal Law and Criminology*, Vol. XXVI, pp. 765 et seq., gives the following figures: Employed under the private system: 24 per cent in 1885, 16 per cent in 1932. Engaged in productive work: 75 per cent in 1885, 52 per cent in 1932.

[3] *Proceedings*, p. 577.

with consideration for the particular features of the trade and without impairing the quality of the goods produced and the training of the prisoners." And No. 4: "In extreme cases also a diminution of the working hours with regard to individual prisoners and division of the work among a larger number of prisoners."

Surely, these last recommendations must be severely condemned as a rather abject retreat before the principle of non-superiority. It is difficult to understand how, in a time when progressive prison administrators more strongly than ever feel the need for thorough vocational training of prisoners, the foremost international body of experts should have stabbed them in the back by suggesting replacement of machine work by hand work and diminution of working hours. Although these suggestions are subject to many reservations—which, by the way, if taken seriously, would reduce the practicability of these recommendations almost to zero—the injury is already done, as prison administrations with no particular eagerness for overcoming anything more than average difficulties may well acquiesce in the principles expressed in the Resolution, whilst shutting an eye to the reservations. That many countries had, already before 1935, been compelled to accept similar terms is well-known,[1] but did hardly justify such a solemn sanctioning of practices to which they unwillingly had to submit.

It is gratifying to see that, in spite of the high rate of unemployment, the English Prison Commissioners have shown no inclination whatsoever to follow the lead given by the I.P.P.C. If we examine at random some of their recent annual Reports, we find that—

[1] See, e.g., Maurice C. Kaplan, loco cit., for the U.S.A.

instead of reducing the use of machinery and of working hours in prison—the greatest care is being taken to increase both.[1] This certainly does not mean that an ideal state of affairs has been reached. To be saved from undue optimism in this matter we have only to turn to the *Report on the Employment of Prisoners* (Part I, 1933), and to the critical remarks made by Miss Margery Fry[2] and Mr. Leo Page[3]—not to mention the statements in some of the recently published memoirs of ex-prisoners.

The hostile attitude of the general public towards anything in the employment of prisoners that might convey a hint of competition has driven prison authorities all over the world to find some sort of work that could be regarded as an *extension* of the existing volume of work rather than as competition. Land drainage, afforestation, reclamation of soil, though perhaps not throughout of positive value for professional training, may be most appropriate for fulfilling this negative requirement.[4] Characteristic of the existing susceptibilities of public opinion is the way in which the Prison Commissioners, according to Press statements,[5] launched their new scheme of establishing labour camps for Borstal boys in the South of England. "It would have to be a camp"—it is said—"that would not displace labour which otherwise would be employed on the rivers. What the Commissioners would like, apparently, was for someone to say: 'Here is a job which financially

[1] See, e.g., *Reports for* 1933, pp. 22–3, for 1935, pp. 31 et seq. for 1937, pp. 26 et seq.

[2] *Howard Journal*, 1934 (Vol. IV, No. 1), pp. 18 et seq.

[3] *Crime and the Community* (1937), pp. 148, 158–9, 161–2, 176, 200, 286; see, on the other hand, p. 221 (Wakefield).

[4] See, e.g., *Report on Employment of Prisoners*, I, pp. 62 et seq.

[5] See, e.g., *Daily Telegraph and Morning Post*, October 18, 1938.

is not economic, but if it were done it would relieve flooding and might make it possible to employ more labour than is to be employed if the work was not done.' "

It is not without interest to study the effect of the recent changes in the German labour market on the employment of prisoners. First of all, it must be noted that the numerical significance of the problem is much greater in Germany than in England, since the number of German prisoners is much higher even in proportion to the population. According to *The Times* of April 17, 1938, there were at that time a total of 113,000 persons (including 24,000 remand prisoners) in German prisons and concentration camps, as compared with a daily population of about 10,000 in England and Wales,[1] which means that Germany has, in proportion, about 7·5 times as many prisoners as England. As there is in Germany at present an acute shortage of labour, and as private enterprise is unable to oppose Government plans on grounds of individual profit and fear of competition, one should expect that there are no longer any obstacles to a systematic utilization of prison labour in the common interest. Many attempts have in fact been made to secure this end. Decrees of the Reichsminister of Justice of July 23, 1937, and June 7, 1938, provide that prisoners have to take their full share in the work of the Four Years Plan.[2] The employment of

[1] See, e.g., *Report of the Prison Comm. for* 1937, p. 15. In the useful international survey of prison statistics published by the Howard League for Penal Reform in 1936, under the title *The Prisoner Population of the World*, the following respective percentage figures are given: Germany, 1935, 156·9; England and Wales, 1935, 29·9 prisoners per 100,000 of population.

[2] See *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 58, p. 478; *Blätter für Gefängniskunde*, Vol. 69.

prisoners in the domestic services and in unproductive work for private enterprises has to be restricted. As the iron and metal industries are of particular importance for armaments, the prison administration had to establish special workshops for the 8,000 metal workers among the prison population. In addition, agricultural work, reclamation of land, etc., has to be increased. The Government has, for instance, acquired an area of about 25,000 *ha* = 62,500 acres of moorland in Hanover for reclamation. The work was originally taken in hand by the *Reichsarbeitsdienst*, but this group was later needed for other purposes and about 10,000 prisoners had to take their place.[1] They are distributed in seven camps over the whole area. Each camp has about 1,500 prisoners and 200 guards and is surrounded by high walls or barbed wire. They are, therefore, very different from the English idea of minimum security camps.

The State's needs for labour have become so urgent in Germany that even remand prisoners, contrary to all the established principles of prison administration, can now be forcibly set to work, under a decree of the Minister of Justice of March 23, 1938.[2] The provision of the Code of Criminal Procedure which expressly lays down the principle that remand prisoners may be subjected only to such restrictions of their liberty as are necessary for the maintenance of good order within the prison—this provision has not been repealed, but has simply been overruled by the ministerial decree. The decree, on the other hand, provides that remand

[1] See the description in *Blätter für Gefängniskunde*, Vol. 69 (1938), pp. 186 et seq.

[2] See *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 58, p. 479.

prisoners, notwithstanding their duty to work, must be granted the time necessary for the preparation of their defence, and that they may (not "must") be allowed to choose for themselves a reasonable method of employment.

In spite of the great scarcity of labour in Germany, it does not mean that all these and many other efforts to engage the prison population in productive work have aroused universal enthusiasm, in particular on the part of the peasants. The peasants, though deprived of the assistance of their sons by the introduction of the two years' military service, apparently dislike the idea of having them replaced by prisoners. In an article published by a prison governor in Westphalia at the end of 1937,[1] the author mentions the following objections: the damage done to the free agricultural labourer—an objection particularly unconvincing in view of the fact that the lack of farm workers has compelled the German Government even to admit about 30,000 Italian workers—the detrimental effect upon the attempts of the State to settle a part of the industrial population on the land, and, last not least, the idea that it means a loss of social status to the free peasant and farm labourer if prisoners are allowed to do the same kind of work on the land. This seems to have gone so far that the administrative head of an agricultural district officially urged his burgomasters to boycott the employment of prisoners by peasants.

A special aspect of less eligibility that has never ceased to frighten the man in the street, and sometimes even the expert, is the relation between *penal institutions and workhouses*. How far is it true that, if the standard

[1] Dr. Wüllner, *Blätter für Gefängniskunde*, Vol. 68 (Oct.–Nov., 1937), pp. 286 et seq., especially 291.

of life in penal institutions becomes too high, workhouses are threatened by a general exodus of their customers to prisons? When the ordinary middle-class man makes his holiday plans, he writes for prospectuses from numerous hotels and chooses according to their respective merits. Is this similar with the tramp or petty offender who, desirous of a brief winter respite, makes his choice between the workhouse and the prison? To a certain degree, this has been and probably still is the case under special economic conditions and with special categories of people. Poor Law Reports as well as the Reports of the Prison Commissioners deal with this anomaly, the former—as is only natural—being somewhat more reluctant to admit that Poor Law Institutions may sometimes come off second best in this competition. There is doubtless a great amount of evidence as to the widespread abhorrence of the workhouse. A hundred years ago, a Cambridgeshire farmer testified before the Committee on the State of Agriculture, 1836:[1] "Several of the best and honest labourers have said to me that . . . before they will go to the Union Workhouse, they will rob on the highway." In 1929 a Prison Governor writes:[2] "One continues to note a large number of young men who have taken to the road rather than be a burden to their relatives. It is somewhat of a paradox that having thus shown their independence they will go to Church Army or other hostels, will beg, will even commit crime rather than enter a casual ward." And he complains that there are no visitors or Aid Societies

[1] Quoted by Charles R. Fay, *Life and Labour in the Nineteenth Century* (1927, p. 103).

[2] *Prison Comm. Report for* 1929, p. 40. See also *Report for* 1908–9, p. 10.

attached to casual wards who could secure jobs for their inmates as they try to do for prisoners. In the *Report for the Relief of the Casual Poor of* 1930[1] the following interesting observations are to be found: "Other witnesses called our attention to the fact that, as regards accommodation and dietary, conditions in casual wards compare unfavourably with those in prisons, and they justified alms-giving to wayfarers on the ground that poor men who keep out of prison deserve some reward for avoiding breaches of the law, despite the additional comforts they could obtain by becoming convicted lawbreakers. We have no doubt that these witnesses underrate both the degree of self-respect which prevails amongst poorer wayfarers and their proper repugnance to the disgrace and complete loss of liberty which a sentence to prison entails. The evidence we have obtained shows that it is rarely that men deliberately commit offences with the intention of getting into prison. The governor of a prison informed us in this connection that: 'Any comparison which the casual makes between prison conditions and those of the casual ward is invariably in favour of the former, but very few casuals voluntarily seek a sentence of imprisonment, however short . . .' . . . during our visit to Pentonville Prison we talked to a few of the prisoners who had had experience both of prison and casual wards. There was no doubt in their minds that they were better treated in prison than in the average casual ward; they confessed to being better fed in prison, better housed and better treated by the officials, but, to a man, they preferred casual wards to prisons because in casual wards they were free to come and go as they wished." Mr. Henriques, on the other hand,

[1] P. 28 et seq.

writes in his delightful *Indiscretions of a Warden*:[1] "When I have had boys in prison whose cause for crime can definitely be traced to destitution, and I have asked why they have not applied for relief rather than commit a felony, they have invariably replied: 'Thank heaven, I have not stooped so low as that . . .' Great prison reforms have been brought about in the last fifty years. Nothing is more needed than the reform of the casual wards and institutions."

How anxiously every improvement in prison conditions is watched by the general public with the view either to opposing such improvement or, in any case, to use it as a basis for demanding similar reforms for other classes of the population, can be seen from the following example: A few years ago, a question that seems to have aroused much interest was whether old-age pensioners in public assistance institutions should receive pocket-money. As at the same time the Prison Commissioners extended their earning schemes for prisoners, and Press headlines such as "Convicts earning wages!" were a common sight, it was not astonishing to read in a letter to *The Times*[2] from a Public Assistance Officer the following argument: "If prisoners can earn small amounts of pocket-money and it is considered proper that pensioners in a mental hospital should have pocket-money, surely the respectable old people in a public assistance institution should be in no worse position?" Fully justified as this demand may be, surely the analogy would seem to overlook that prisoners do not get pocket-money on account of their respectability but only for the work they have done—work which is not expected

[1] Basil Henriques, *Indiscretions of a Warden* (1937), p. 216.

[2] November 12, 1937.

from old-age pensioners in a public assistance institution.

There exists at present, as everybody knows, a category of human beings to whom English prisons have little or no deterrent effect: the homeless refugees. As Professor Pella, the Roumanian criminologist and ex-minister, said at the Eighteenth Session of the League of Nations Assembly on the 26th September 1937:[1] "Only one alternative remained for them—and the statistics were sufficient evidence—either they must commit suicide or perpetrate crimes of one sort or another in order to go to prison again, for in prison at least they would get board and lodging."

Here may be the place for the discussion of a problem which, though also of an economic character, is essentially an educational problem. It is the question whether inmates of penal institutions—as far as they have reached the age at which average human beings of their social class become responsible for their livelihood—ought to be self-supporting whilst in the institution. This would mean that the average prisoner, or Borstal boy or girl, etc., ought to be set to work under an earning scheme that would truly reflect his earning capacity and that he would be charged for his board and lodging at the same rate as outside, whilst a surplus would be used for the support of his family. Every slackening of effort would instantly be punished by a corresponding deterioration of his standard of living, and there would finally be a sort of casual ward within the penal institution. An idea that is, surely, attractive enough at the first glance. It must appear as an undeniable weakness of almost all existing systems of institutional penal treatment that

[1] See *Journal of the 18th Session*, No. 13, p. 177.

the persons treated—most of whom are used to living under the normal economic rule of "Those who do not work do not eat"—become accustomed to conditions of almost ideal economic security, which they hardly can expect to find in the outside world. Instead of having their sense of responsibility and initiative strengthened they are in danger of losing the last remnants of it. Here at last, Economics and Penology seem to go hand in hand.[1] It is therefore easy to understand that some of the best-known and most enterprising penal reformers and educationists of modern times, as William R. George and Homer Lane, have seriously attempted to eliminate this fundamental handicap by completely changing the traditional system, in particular as far as adolescent offenders are concerned. The George Junior Republic in the State of New York as well as Homer Lane's Little Commonwealth in Dorset were founded on the principle "Nothing without Labour" and upon an imitation of the economic laws which dominate the Big Commonwealth outside—an idea which is actually driven to the extent of establishing a workhouse within the institution for those who, through their own fault, are unable to

[1] In English prisons, this idea was predominant a century ago, when—as the Webbs put it (*English Prisons under Local Government*, p. 84)—"even the ablest of the reforming Justices . . . never shook themselves free from the notion that all prisoners should maintain themselves. . . . There grew up a system of profit-sharing under which the comfort of each prisoner depended solely on the productivity of his labour. . . ." But already in the first London Bridewell from 1557 "the prisoners were paid for their labour and in turn the stewards were to charge those employed for their meals" (A. van der Slice, *Journal of Criminal Law and Criminology*, Vol. XXVII, p. 51). See also L. W. Fox, *The Modern English Prison*, p. 10.

support themselves.[1] In the first "Q Camp"—a promising private experiment which was started in May 1936 in the South of England for the training of certain types of delinquent and non-delinquent boys[2]—a small portion of the contributions which have to be paid on behalf of the inmates is set aside as "taxation." This provides a fund out of which those who have not performed their weekly task are maintained on "poor relief."

Nevertheless, even in the George Junior Republic the economic principles of the outside world are discarded at least in so far as the citizen of the Republic is paid not only for his work in the industries of the institution, but also for his school marks.

It is not for us to discuss the practical *possibility* of carrying out such a complete reversal of policy in big institutions. This should be left to the expert prison or Borstal administrator who alone is competent to judge. What may, however, be suitably submitted for consideration to a wider circle is the *desirability* of such an idea on principle. Its advantages we have already outlined. The question remains whether there are perhaps intrinsically connected with them certain very real difficulties. The *Report of the Departmental Committee on the Employment of Prisoners*, published in 1933, though very anxious to stimulate the energy and working capacity of the prisoner, was

[1] See Elsie T. Bazeley, *Homer Lane and the Little Commonwealth* (1928) (George Allen & Unwin), p. 80; William R. George, *The Junior Republic* (1909), pp. 56, 219 et seq.; and, in particular, Donald T. Urquhart's fascinating Report in Sheldon and Eleanor Glueck's Symposium, *Preventing Crime* (1936), Chapter XVI.

[2] See the report on the first year's experiences, by the Camp Chief, Mr. David Wills, in *The Penal Reformer*, April 1937, p. 11.

opposed to this idea:[1] "Many of the unofficial witnesses," it is stated in the Report, "suggested to us that a system of wages comparable to those paid in outside employments should be instituted and that out of such wages prisoners should be required to pay the cost of their maintenance and possibly something towards the support of their dependents. To such a proposal we see many objections. Most prisoners are unskilled and during their period of learning could not economically be paid wages or at any rate such wages as would cover the cost of their maintenance. The suggestion that the practice of certain foreign countries should be adopted and that prisoners should be provided with the bare necessities of existence and should be made to depend on their own exertions for any additions to the minimum, is not one which would recommend itself to British ideas."

The author may be permitted to repeat here an argument brought forward by a member of his Seminar who had a fair amount of practical experience with adolescent offenders. These boys, he said, have already suffered too much under the strain of having to support themselves from their early youth. What many of them need most when in an institution is a period of quiet introspection devoted to self-education and professional training without unceasing pressure from outside.

This argument contains a good deal of truth, and this has obviously been recognized by the English Prison Commission which has refused to introduce the idea of economic self-responsibility in the prisons and Borstal Institutions of this country. The divergence of opinions may, at least partly, be due to a difference

[1] Part I, p. 69.

in the educational methods employed, the American system depending more than the English one on the idea of free self-determination and self-responsibility of the individual. A penal administration that has to steer the middle course cannot experiment in this way. It is a different question whether it may not in future become possible gradually to increase the amount of earnings in penal institutions. There has in recent times been hardly an innovation in prison life that has been more heartily welcomed than the earning scheme,[1] and, if well-balanced, some further extension may still deepen its good effects.

The application of the principle of non-superiority is by no means restricted to life and labour in penal institutions. As soon as the penal system establishes non-institutional forms of treatment or as it extends its care to the post-institutional life of the offender, it is bound to clash, in some way or other, with that fundamental idea. Whenever a probation officer does his work efficiently by sending his probationers to Summer Camps [2] or by providing them with suitable jobs, or when the authorities grant money contributions for the maintenance of probationers who are placed in lodgings or boarded out in families,[3] whenever this is done, there will always be brought forward the objection that probationers, etc., are now better off than many non-delinquents of corresponding social groups. Even the mere fact that being placed on

[1] See, e.g., *Prison Commissioners' Reports for* 1936, pp. 33 et seq., 1937, pp. 74, 80, 85.

[2] See *Sunday Times*, August 21, 1938.

[3] Home Office Circular of December 16, 1937, No. 685,564/78 (see *Probation*, Dec.–Jan. 1938, p. 171), and *Fifth Report of the Children's Branch* (1938), p. 36.

Probation means the acquisition of a friend upon whom you can rely in case of need can easily be interpreted as a violation of the principle of non-superiority, and as a reward for wrong-doing. Time and again the author has been told by people in practically every walk of life how much it is commonly regarded as a matter of fact that "if you are out of work, just pinch a lady's handbag, and the Probation Officer will find you a job." Such a state of affairs and of mind would surely be most undesirable, if it were at all widespread. However, occasional observations of this kind cannot as yet be regarded as adequate evidence, particularly as observers of such phenomena are but seldom entirely unbiased. Even if their complaints should have to be accepted as well-founded, however—even then the way-out of this dilemma can only be sought in creating better employment and spare-time conditions in general and by educating youngsters of the type in question to a better understanding of their responsibilities.

For those who share our view, it must be very gratifying to find in a clause of the new Criminal Justice Bill [1] the most unmistakable renunciation of all those traditional scruples. I am referring to what is perhaps one of the wisest parts of this Bill, i.e. to the section that deals with the establishment of so-called "Howard Houses," where offenders between 16 and 21 years of age "may be required to reside under disciplinary conditions which permit of their leaving the house for the purpose of employment," etc. For such adolescents the Bill requires arrangements to be made for providing employment for them outside the Howard House "at a rate of wage not lower and on conditions not less favourable than those generally recognized in the

[1] Clause 13 (2).

district by good employers."[1] By *good* employers! This is definitely a standard superior to that reached by all those non-delinquents who are not fortunate enough to get work with a good employer. Nevertheless, it is probably the only efficient method of fighting that anti-social feeling that is the chief source of delinquency. Every policy that has persisted in placing the delinquent at the bottom of the social ladder has proved a failure, since penal justice cannot, in the long run, completely change the psychological urge of human beings to get an adequate reward for their work and to rise above certain groups of their fellows.

Would it be too bold an interpretation if we might regard this special clause of the Bill as the expression of a general principle that could be extended to many other practical problems of this kind?—in other words, as an official acknowledgement of the futility of the principle of non-superiority?

It is, however, the treatment of the *discharged* prisoner, Borstal inmate, etc., that offers the most far-reaching opportunities for clashes of principle.

Nothing in the immediate past has probably done so much to draw the attention of a wider public to problems of *After-Care* than the recent correspondence in *The Times*, which began and ended with a letter from "An Unemployed Ex-Convict," and in which a number of outstanding experts participated.[2] There

[1] Clause 13 (2).

[2] See *The Times* of September 15, 16, 17, 21, 23, 27, and October 1, 7, 10, 1938.

As to the present position of After-Care work in England see, apart from the *Report on the Employment of Prisoners*, Part II (1935), the *Prison Commissioners' Report for* 1937, p. 33; John A. F. Watson, *Meet the Prisoner* (1939), Chapters X and XI; Cicely McCall, *They Always Come Back* (1938).

was, of course, nothing new in "Ex-Convict's" complaint that, having been a black-coated professional man, it proved almost impossible for him to obtain suitable work, or any work at all. And easy to understand is his suggestion that discharged prisoners ought to be given "not merely temporary financial relief but work, some sort of established security." Was his request reasonable—in a period of widespread unemployment? Isn't it a demand for a highly privileged position?[1] "There are those whose claims on behalf of discharged prisoners sound as if the commission of a crime entitled a man to good employment upon his discharge," writes Mr. Leo Page,[2] "that attitude is absurd. Wrong-doing cannot be a passport to preferential treatment." And it is not only the securing of a job: it might be worth mentioning in this connection that the establishment of special homes for discharged prisoners sometimes meets with the same objection that it would give them a privileged position as compared with vagrants and the unemployed.[3] It is obvious that thoughts of this kind—perfectly natural to many otherwise fairminded and benevolent persons—are bound to hamper the work of After-care. There are plenty of other difficulties, too. There is the economic difficulty of finding jobs for any person not endowed with special abilities. There is the social fact that employers are somewhat reluctant to place ex-prisoners in positions of trust, and that co-workers may even more strongly object to having to work side by side

[1] See Mr. Leo Page's and the Prebendary Wilson Carlile's letters.

[2] *Crime and the Community* (1937), p. 361.

[3] See *Proceedings of the XIth International Penal and Penitentiary Congress*, Berlin, 1935 (Berne, 1937), p. 264.

with ex-prisoners.[1] And, finally, there is sometimes the undue curiosity of the Press which may frustrate the justifiable wish of the ex-prisoner to hide his past.[2] It is interesting to see how the correspondents of *The Times* have tried to cope with at least some of these difficulties: One of them, himself an employer, makes the valuable suggestion to provide ex-prisoners with a fidelity guarantee which, he thinks, would induce many employers to take the risk, or, in cases where even such a guarantee fails, to offer ex-prisoners work in State-managed factories.[3] Others stress the necessity for permanent friendly supervision. *The Times* itself expresses the view that some departure from the principles of pure logic in finding work might be necessary, since otherwise ex-prisoners would always have to remain "at the back of the Labour Exchange queue, till all unconvicted men are absorbed."

Surely these are ideas worthy of serious consideration. In particular, the idea of getting some sort of guarantee against losses might appeal to those employers to whom the economic risks involved in taking ex-prisoners form the chief obstacle. As to the employment of ex-prisoners by Government Departments, there seems to be a slightly growing body of opinion that at least those who had been so employed previous to their conviction should be restored to their posts in suitable cases.[4] What, however, about those who had not

[1] See also the case quoted by Mr. Rich, *Recollections of a Prison Governor* (1932), p. 240.

[2] See John A. F. Watson, op. cit., p. 197.

[3] Mr. Kenneth Garle, *The Times*, October 11, 1938.

[4] See, e.g., the letter to this effect published in the *Sunday Times* of January 8, 1939. The present official attitude can be gathered from paragraph 88 of the Report of 1935. Some interesting continental material is to be found in *Actes du Congrès Pénal et Péni-*

before been in the Government service? An ex-prisoner who submitted many reasonable suggestions to the Committee of 1935 [1] suggested that printers trained at Maidstone should be employed and given further training in H.M. Stationery Office.

Nevertheless the transformation of these suggestions into actual practice will largely remain a pious wish as long as there is hidden beneath the surface of the community the belief in the justness and inevitability of the principle that the ex-prisoner ought not to be treated more favourably than any other citizen. No one who has studied the Reports of the various After-care Associations and knows something of their work can fail to be impressed by their spirit and successes. But what sort of reply can they make when encountering obstinate resistance clothed in a passionate appeal to the principle of non-superiority? Will it always be sufficient to reiterate that the ex-prisoner is in *greater need* of support than the ordinary work-seeking citizen? Or does there perhaps arise here one of those rare opportunities for smoothing the path of the social agencies concerned by the application of a *theory*? The author ventures to submit that it is possible to prove—by means of a purely theoretical consideration—that the principle of less eligibility and even that of non-superiority is out of place within the present system of After-care. Is it not an established truth to-day that, from the point of view of the law, a sentence of imprisonment should involve nothing but loss of liberty or—to repeat a well-known dictum—that men are sent to prison "*as* a punishment, and not *for* punish-

tentiaire International de Prague, Vol. IV (Berne, 1930), pp. 1–86, especially 59 (Holland).

[1] *Report*, Part II, p. 97.

ment?"[1] The *Law Journal*,[2] commenting on Sir Samuel Hoare's speech of July 27, 1938, makes the following pertinent remark: "The exact object of imprisonment as a punishment may be a matter of argument, but fundamentally it should mean no more than deprivation of liberty, leaving the prisoner free to maintain his interest in mental and physical activities, so as, on release, to enable him to regain a position as a useful member of society." In fact, however, imprisonment necessarily means much more than this. It is not only the prisoner's liberty, it is usually his and his family's whole existence, their livelihood and their reputation that are affected or even destroyed. The State has here placed itself in the role of a Shylock who, being entitled to a pound of flesh only, would take the blood of his debtor also. As a consequence, it becomes the legal duty of the State to compensate the prisoner for this excess of evil that the execution of the penalty has inflicted upon him.

Moreover, the present system of extensive association of the prisoners within the institution, indispensable as it is for their professional and character training, undoubtedly has its special dangers. It was regarded as one of the chief merits of the old method of strictly solitary confinement that the prisoner, after discharge, having had no contact whatsoever with his fellow prisoners, was able to re-enter society unmolested and unbetrayed by them. When, a hundred years ago, prison experts from England and the Continent—as already mentioned—came to Pennsylvania to inspect the newly built Eastern Penitentiary in Philadelphia, they were unani-

[1] See, e.g., *The Home Office Report on the Psychological Treatment of Crime* (1939), p. 14.

[2] August 27, 1938, pp. 137–8.

mously told by the inmates how greatly the prospects of a discharged prisoner had improved by the prevention of dangerous associations.[1] Now that isolation is a thing of the past, it is for the State to compensate the ex-prisoner for those consequences of the new system which even the most accomplished classification cannot altogether eliminate. It is interesting to read[2] that "the Danish prison authorities defend solitary confinement on the ground that Denmark is such a small country that . . . it would be wellnigh impossible for an ex-prisoner to live down his past and escape blackmail if he had become personally known to large numbers of other prisoners. Acting upon this principle only recidivists . . . and prisoners serving long sentences are permitted to work in association, and practically all other male prisoners are kept in complete solitude."

There is still another theoretical consideration that offers itself in this connection: the profound contrast between the old and the new methods of criminal justice cannot fail to impress its marks upon the system of After-care. The classical school of criminal law—it is necessary in this connection to repeat this commonplace—was, on the whole, content to make the punishment fit the crime, without paying much attention to the personality of the criminal, whilst the modern sociological school tries to adapt the treatment to the individual needs of the offender. This change, whilst often implying greater leniency, may sometimes, on the contrary, lead to the imposition of long-term penalties for comparatively petty offences

[1] See, for instance, Dr. N. H. Julius, Preface to his German translation of Beaumont and Tocqueville's book on the *American Penitentiary System* (1833), p. xxxi.

[2] Roy Calvert, *Howard Journal*, 1929, p. 303.

which would previously have been visited with much shorter sentences. As a consequence, the community might, under the old system, well have claimed the right to show its disapproval of an ex-prisoner, to make up for the deficiency of his penalty, whilst this may now no longer be justified. Moreover, the more the administration of criminal justice adapts itself to the idea of reformation, the more ought society regard the fact of discharge in itself as a presumption that the offender has become reformed. A presumption of reformation, which means that it is no longer the offender who has to prove his reformation, but the community which has to rebut that presumption if it wants to treat the offender as unreformed. If modern society pretends to adapt its penalties to the personality of the offender as well as to his crime, both logic and justice would seem to demand that those penalties should be regarded as completely settling the account. This must even apply to the period of remission, in spite of the conditional character of a discharge on licence, which should only entitle the State to exercise closer supervision, not, however, give the community the right to throw stones. Were it otherwise, it might be better to abolish altogether the system of discharge on licence.

It will well be again objected that placing the ex-prisoner in a privileged position as to employment, etc., would mean a definite incitement to crime. Those who cannot get rid of this fear should bear in mind that no amount of privileged treatment by the State and employers that can reasonably be expected in actual practice will ever succeed in completely restoring the social balance in favour of the offender. All that can be hoped for is, to use Mr. John A. F.

Watson's words, "not to promote them to the front of the queue, but to see that they take their turn with the rest."[1] Considering the swiftness with which things have been progressing in this country within the last few decades, this goal may not be so remote as it perhaps appears. No longer than five years ago a prison governor wrote: "If a discharged convict or Preventive Detention man were eligible for Unemployment Benefit for a period of six months, it might well be possible to close a Convict prison, though I fully realize that such a suggestion is visionary."[2] To-day, this apparently visionary goal seems, on the whole, to be within reach.[3]

To sum up: The principle of less eligibility and, to a lesser degree, the principle of non-superiority are the greatest obstacles in the development of efficient methods of prison labour and of After-care. They are *incompatible* with the idea of *reformation*, which forms the very basis of the modern penal system. Moreover, both principles are equally at variance with the idea of *individual treatment* of the offender, preferring as both principles do to take into consideration some external requirements rather than the individual needs of each case. It is the standard of life of the poorest classes of the population that is automatically taken as a guide, independent of the previous standard of life of the individual prisoner concerned. No regard whatsoever is paid to the fact that offenders belong to different

[1] *Meet the Prisoner*, p. 200.

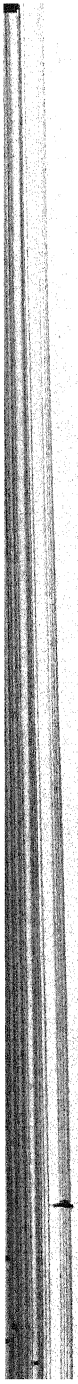
[2] See *Prison Commissioners' Report for* 1934, p. 68.

[3] See the comprehensive account of the present position by Mr. John A. F. Watson, op. cit., Appendix A, especially pp. 239 et seq.; moreover, Mr. H. E. Norman in *Probation*, December 1937–January 1938, p. 169.

social classes and that for all members of the better situated classes a rigid adherence to the principle of less eligibility means to make their punishment much more severe than that of the others. Let there be no misunderstanding: It is surely a commonplace to say that prison, for instance, will usually be felt more severely by well-to-do people than by members of the poorer classes, and there can hardly be any objections against this inequality as long as it constitutes nothing but an inevitable consequence of the fact that life in a mass institution can never be a bed of roses for those accustomed to luxuries. It is not greatly otherwise in the army, and perhaps not even in many public schools. As soon, however, as this state of rigidity and frugality becomes part and parcel of a deliberate policy to make the prisoner feel his inferiority, the contrast between the social classes gains another significance. As a matter of justice, the social status of the prisoner—which hitherto could be treated as a *quantité négligeable*—may now have to be taken into account, and it is thus that the application of the principle of less eligibility amongst others compels our paying attention to the much wider problem that may be called the *social implications of Penal Reform.*

PART II

THE SOCIAL DILEMMA OF PENAL REFORM



CHAPTER IV

THE SOCIAL IMPLICATIONS OF THE PRINCIPLE OF LESS ELIGIBILITY

THE penal problem is not only—or we can perhaps say not even chiefly—concerned with the economic consequences of wrong-doing, disastrous as they may be. It is often much more in his capacity as a social entity that the offender has to pay the penalty for his crime. And it is symptomatic of the position that in this field the progressive steps from the principle of less eligibility to that of non-superiority and beyond have not been taken—more, that they are here entirely out of the question. Not even the boldest penal reformer has ever dared to suggest that the criminal, as a reward for his crime, ought to secure a promotion on the social ladder, because this might be conducive to his reformation. Thus, we have here to face not an account of possible profits, but a terrible list of losses. It is to be regretted that modern sociologists, who are so keenly interested in the problems of class, of loss of social status, etc., have so far abstained from devoting more than passing attention to the very complicated relations between social status, on the one hand, and crime and punishment, on the other.

The social implications of punishment vary, first according to the character of the social *agencies* which have it in their power to inflict evils on the lawbreaker and, secondly, according to the nature of the *evil* imposed. These agencies may be either the State itself, or certain disciplinary bodies acting upon the authority of the State, or it may be public opinion

acting as the self-appointed organ of the community. Needless to say that either of these agencies may react in a very different way in an individual case. The one may acquit where the other condemns, and vice versa. Whilst the reactions of the State against crime have been the object of prolonged studies, those emanating from the community have been neglected. They, too, ought, however, to form the concern of Penology. In other words, instead of purely casual observations, a systematic investigation ought to be made of the way in which public opinion reacts on the different types of punishment. Of what kind is the social stigma—if there is such a stigma at all—attached to a death sentence, to penal servitude and imprisonment, to committals to Borstal Institutions and Home Office Schools, to Probation and fines? How far is it true that this stigma is, in fact, a consequence not of the penalty but of the crime committed? Is it a necessary evil which, much as we may regret it, we are unable to eliminate from the present social fabric, or is it part and parcel of a deliberate penal policy to use the social stigma as a convenient and efficient means of fighting crime?

As may easily be gathered even from this imperfect enumeration, we are here confronted with such a multitude of complicated problems that it is very hard indeed to decide where to begin and where to end.

We may perhaps choose as our point of departure the fact that persons who happen to commit crimes have a certain social status. How is this status affected by the commission of a crime and how far is it taken into consideration by the organs of the State, either on account of explicit legal provisions or on their own initiative?

The way in which the Criminal Law, in the course of the centuries, has been dealing with the social status of the offender forms one of the most interesting parts in the history of legal institutions. To cut a long story short, it is generally acknowledged that we have to distinguish two different chapters, running almost simultaneously, in this historical development—different in origin as well as in tendency: the first set of legal provisions deriving its stimulus from the ideas of *retribution* and *vengeance*, the second from the desire to *protect society*.[1]

Retribution and vengeance are at the root of the medieval system of *defamatory penalties*—a system too well-known to need any description in detail—and to the same extent in which both these ideas have been losing strength, this system is gradually crumbling away. To-day we have to deal with such remnants as still show sufficient vitality to weather the storm and, for this reason, are often regarded as indispensable. From the point of view of expediency one might indeed be inclined to accept this theory of indispensability, as it would solve most of the difficulties created by the economic consequences of the principle of less eligibility. A system that makes ample use of defamatory penalties could perhaps more easily renounce those devices that make the lawbreaker's lot economically more miserable than that of his fellow citizens. With the reformatory aspects of modern penal methods, however, degrading penalties are utterly irreconcilable.

[1] See for the following text: v. Liszt, *Lehrbuch des Deutschen Strafrechts*, §65; Rudolf His, *Das Strafrecht des deutschen Mittelalters*, Vol. I (1920); Eberhard Schmidt, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 45, pp. 10 et seq; Max Grünhut, *Zeitschrift*, Vol. 46, pp. 260 et seq.

It may be well to remember one fact of the history of penal institutions, a fact as simple as it is impressive: When, since the middle of the sixteenth century, in England and later on the Continent institutions of a reformatory character began to be established—the English Bridewells and the Continental *Zuchthäuser* [1]—they showed this characteristic feature that—in marked contrast to the old gaol—they bore *no defamatory character*. For those who know that in later periods up to now the German word *Zuchthaus* has been used to denote just a distinctly defamatory type of punishment, this may sound somewhat strange. Our authorities, however, are so explicit on this point that no doubt can remain.[2] And more than that, the penalty of *Zuchthaus*—far from branding the inmate as infamous—had even the power of hall-marking as honest those who had not been so before reception.[3] Surely, this is one of the most remarkable examples of the complete change of meaning (*Bedeutungswandel*) that words may have to undergo in the course of their career. But perhaps more striking than this linguistic feat is the penological wisdom that had already then realized how impossible it is to bring about reformation by

[1] See above, p. 48.

[2] See, e.g., H. N. Kriegsmann, *Gefängniskunde*, pp. 6–7; G. Bohne, op. cit., Vol. II, p. 180.

[3] See Frede's Review of Günther Pietsch, *Das Zuchthauswesen Alt-Danzigs*, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 53, pp. 757–8. A. van der Slice, *Journal of Criminal Law and Criminology*, Vol. XXVII, p. 46 et seq.; A. Ebeling, *Beiträge zur Geschichte der Freiheitsstrafe* (1935), p. 53 (the Aldermen of Hamburg call their *Zuchthaus*, in 1713, "honest detention"); especially W. Traphagen, *Die ersten Arbeitshäuser und ihre pädagogische Funktion* (1935), p. 73, who quotes from Keckermann, *Systema Disciplinae Politicae publicis praelectionibus* (1606): "honestior carcer qui nullam infamiam importat."

defamation—or even in spite of defamation. One possible explanation is, of course, that the Bridewell and the *Zuchthaus* were, at that time, regarded not as penal institutions, but exclusively as workhouses under the Poor Law. This interpretation, however, can hardly be accepted in the face of contemporary Statutes "expressly authorizing penal discipline, instead of mere reformatory treatment, in the Houses of Correction."[1] In the course of time, the Bridewell lost its honest character so completely that Blackstone mentions "hard labour in the House of Correction" among the ignominious penalties such as whipping, the pillory and the ducking-stool.[2]

The *second set* of legal provisions is based upon the idea that the law-breaker—having proved himself unworthy—must be deprived of certain special privileges and of his civil rights, which he might only abuse. The more *protection of society* has become the catchword, the more prolific have become the activities of legislation in this field. Whilst the different legal systems show wide variations in detail, certain fundamental characteristics are common to most of them. The offender who is convicted of a serious crime may have to suffer, for instance, loss of his offices, professional or honorary, and of eligibility for future office, of his pension, of the right to wear decorations and to bear titles and academic degrees, of the right to elect and to be elected in parliamentary and municipal elections, to act as guardian, trustee or witness, and so on. Sometimes these deprivations follow as automatic consequences attached to every severe sentence;

[1] S. and B. Webb, op. cit., p. 16; A. J. Copeland, *Bridewell Royal Hospital Past and Present* (1888), p. 55.

[2] *Commentaries*, fifth edition, 1773, p. 377.

sometimes, however, it is left to the discretion of the judge to make a specific order to that effect.[1]

It may be worth while reviewing the position in the principal countries, as it is just in its treatment of this matter that the spirit of a system of criminal law may manifest itself. Although we are here concerned with legal provisions, one seems justified to discuss them under the heading "Social Implications," since it is the effect of such provisions upon the social status of the offender that matters most to us.

In this respect *French law* is still very archaic. There is still in force the antiquated notion of the Code pénal of 1810 that every more serious crime makes its author infamous. Thus the distinction between the *peines criminelles*, which are either *peines afflictives et infamantes* or *simplement infamantes*, in other words always strongly degrading, the *peines correctionelles* for minor offences which are but slightly degrading, and the non-degrading *peines de simple police*.[2] The imposition of a *peine criminelle* causes infamy for life, unless the State intervenes by means of a special act of rehabilitation, which will be discussed later. It is significant that French textbook-writers regard it as necessary to state explicitly that this condition of infamy is at least not transmissible in law to the family of the offender.[3] The most horrible expression of the meaning of infamy is the institution of *dégradation civique*, which forms an actual part of present French law (Code pénal, artt. 8,

[1] See, e.g., the survey by C. J. A. Mittermaier in the fourteenth edition of Feuerbach's *Lehrbuch des Peinlichen Rechts* (1847), §§ 71, 72, 150 et seq.

[2] See for the following text, e.g., Roux, *Cours de droit criminel français*, Vol. I (second edition, 1927), pp. 395 et seq.; Paul Cuche, *Précis de droit criminel français*, sixth edition, 1936, p. 144.

[3] Roux, op. cit.

28, 34). This entails the loss of all public offices, civil and political rights, etc., and this again for life, unless the prisoner receives a pardon or a rehabilitation. French lawyers, though not entirely unaware of the cruelty of this state of affairs, seem to console themselves rather easily with the fact that the individual concerned, by committing the crime, has forfeited the confidence of society; he has become *indigne*, and it is only natural that his moral indignity should find its expression in legal indignity.[1] In spite of this complacent attitude, the Draft Code of 1932 at least proposes a time limit of 20 years.

In *Sweden* the Penal Code formerly provided for an explicit statement, made in the judgement of the Court, to the effect that the prisoner had lost the confidence of his fellow citizens; this provision, however, was abolished in 1921.

Whilst the new *Italian* Code of 1930 shows, in its comprehensive regulations, hardly any notable features, the German and Russian ways of tackling the problem are of greater interest.

According to the *German* Penal Code of 1871, penal servitude bears a distinctly defamatory character. A sentence of penal servitude means, without any exception, the permanent incapacity to serve in the army and navy, and to hold any public office (§ 31 of the Code). In addition, the Court—in certain cases even in connection with simple imprisonment of more than three months—has power to impose the loss of civil rights to approximately the same extent as in French law permanently, if connected with a life sentence, in other cases for no more than 10 years (§§ 32 et seq.). Permanent, however, is even in the latter case the loss

[1] Roux, op. cit.

of those public offices which the prisoner possessed at the time of his conviction (§ 33). Whilst the post-war Draft Codes proposed to mitigate some of these provisions, for the Nazi régime they were not harsh enough.[1] Penal servitude will always in future be regarded as degrading and connected with complete loss of civil rights. In addition, for the most serious crimes a new type of degrading penalty is suggested: outlawry (*Aechtung*), which will mean permanent elimination from the community, combined with the severest treatment possible within the penal institution. All this, however, is not enough. The Commission for the drafting of the new Code has in all seriousness considered the revival of the Pillory. Whilst rejecting its actual re-introduction, the Commission goes on to propose the publication of the sentence, whenever and in what form the Court may think fit, as, for instance, by wireless. *Praeter legem*, similar forms of modern pillory are apparently popular in Greater Germany already now, as may be gathered from a report in *The Times*[2] that Austrian children returning home from a "Strength through Joy" holiday in Germany wore placards with the inscription: "I stole from my fosterparents who befriended me."

As to Russia, every one familiar with the spiritual descent and foundations of the Soviet Penal Code will be inclined to regard one point as beyond any doubt: It was the special desire of the Soviet lawgivers from the very beginning of their activities till the purge of 1937 to keep the Penal Code free from old-fashioned bour-

[1] See for the following text Gürtner, *Das kommende deutsche Strafrecht. Allgemeiner Teil* (1934), pp. 98 et seq.; Graf Gleispach, *Handwörterbuch der Kriminologie*, Vol. II, p. 1075.

[2] *The Times*, August 17, 1938.

geois morality. In close connection with the teachings of Enrico Ferri, the new Russian criminal law expressly adopted the ideas of social dangerousness and social defence, which latter were supposed to be entirely without any moralizing tendencies.[1] Surely, one is inclined to think, here would have been no place for stigmatizing penalties. As Art. 9 of the Soviet Penal Code of 1926 puts it: "Measures of social defence shall not have as their object the infliction of physical suffering or personal humiliation. The question of retaliation or punishment does not arise."[2] It is, therefore, obvious that not a single one of the various measures of social defence can have a defamatory character.

Curiously enough, however, we find in this Code, in the list of "measures of social defence of a judicial-correctional character," measures with a definite stigmatizing tinge, as, in particular, the "public reprimand," consisting in "the public announcement of the judgement to the person convicted, in the name of the court" (artt. 20 j and 39). In addition, there is the possibility of inflicting the "loss of political or of certain civil rights," with almost exactly the same meaning as in the bourgeois Codes (artt. 31 et seq.). For the majority of these provisions it is certainly true to say that they can be interpreted as purely protective instead of retributive. Of some of them, however, as for instance of the deprivation of the right to certain pensions and to unemployment relief, this can hardly be maintained.

[1] See above, pp. 21, 39, and G. Daniel, Enrico Ferri, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 50, pp. 486 et seq.

[2] Official English translation (Foreign Office, July 1934, pp. 59–66).

Present English law[1]—mainly based upon the Forfeiture Act of 1870—shows in one important point a more conciliatory attitude than most other legal systems. Under English law, any losses and disabilities consequent upon a sentence of penal servitude, imprisonment with hard labour, or simple imprisonment exceeding twelve months, cease—at least in principle—to have effect as soon as the prisoner has served the sentence (Forfeiture Act, sect. 7). In other words, these degrading penalties do not follow the prisoner into his private life, as do the corresponding Continental ones. The Local Government Act, 1933, sect. 59, it is true, makes the important exception that a person is "disqualified for being elected or being a member of a local authority if he has within five years before the day of election or since his election been convicted in the United Kingdom. . . of any offence and ordered to be imprisoned for a period of not less than three months without the option of a fine." The Criminal Justice Bill makes two notable proposals for further alleviating the lot of the prisoner in this respect: The first one (clause 63) is nothing but an inevitable consequence of the proposed abolition of penal servitude. At present every person sentenced to penal servitude loses the right to sue for or to alienate property, etc., with the consequence that the Crown may have to appoint an administrator for the duration of his sentence (sect. 6 to 30). All these disabilities it is rightly proposed to abolish. The other suggestion refers to sentences of imprisonment of more than twelve months as well: Whilst at present the loss of

[1] See Halsbury, *Laws of England* (Hailsham edition, Vol. IX, 1933), pp. 259–60; John A. F. Watson, *Meet the Prisoner* (1939), pp. 255 et seq.

pension or superannuation allowance is compulsory for all sentences mentioned before, it is now proposed to grant to the competent authority the power to restore the pension or allowance, either in whole or in part (clause 64). Bearing in mind the fact that pensions and superannuation allowances are really a part of the salary, which has already been earned, this innovation is much to be welcomed.

In a few statutes, power is given to the Courts to publish a conviction so as to make it known to a wider circle, as, for instance, where a person is for the second time convicted of the offence of knowingly and wilfully selling unsound meat, etc., the Court may order that a notice of the facts be affixed to any premises occupied by the offender.[1]

In addition to those statutes providing the loss of civil rights and privileges, of public offices, etc., there is, however, still another idea that has recently come much to the foreground: the deprivation by judicial sentence of the right to carry on certain *professions* or *callings*, if the offence was committed in abuse of them or under violation of the duties arising from them. Such a deprivation is already permissible in Germany,[2] Italy,[3] Russia,[4] and the whole question was under discussion at the Eleventh Penal and Penitentiary Congress in Berlin, 1935.[5] The resolution adopted by the Congress follows on the whole the line of the law which came into force in Germany in 1933.

[1] Public Health (London) Act, 1936, sect. 180–4.
[2] Prevention of Crime Act, 1933, § 42 1.
[3] Penal Code of 1930, artt. 30–31.
[4] Penal Code of 1926, §§ 20, i and 38.
[5] *Proceedings*, pp. 243 et seq., 581 (Section III, Question 2).

English law has been somewhat more reluctant in this matter. There are, it is true, many cases where a person convicted of certain crimes may be removed from the list of a profession,[1] but this is done not by the Court, but by the professional bodies themselves. These bodies have it usually well in their power to grade the professional disqualifications resulting from a conviction according to the nature of the offence. A solicitor, for instance, *may* be struck off the rolls if convicted of a criminal offence, but only if the offence "is of such a character as to make it expedient for the protection of the public and the profession."[2] On the other hand, if a solicitor is guilty of an offence, he may be disqualified, even if there have never been any criminal proceedings against him.

In addition there exists the well-known possibility to impose driving bans upon motorists which the Criminal Justice Bill (clause 36) proposes to extend to certain categories of recidivists beyond the scope of motoring offences.

Even from this brief summary it has become sufficiently clear that the theoretical differentiation between both sets of legal provisions—those intended for defamation, and those aiming only at the protection of society—is often impossible to perform in practice. It may well be repeated again and again that those statutes which impose the loss of certain privileges and civil rights, or of the right to carry on a certain profession, are exclusively aimed at the protection of society without intending any defamation of the prisoner. In real life, such losses of legal status will

[1] John A. F. Watson, op. cit., pp. 267–8.

[2] Halsbury, *Laws of England*, Vol. 31 (second edition, 1938), p. 298.

always be followed by social degradation. How can this be otherwise?

The traditionalists, no doubt, will say: Unfortunate and ineffective as such a stigmatizing legislation may sometimes appear, public opinion demands it, and its abolition would be of little use, since the loss of social status is in fact a consequence not of the penalty with all its legal ramifications, but a consequence of the crime itself. If this were generally true, it would throw us back to that time-honoured argument against the abolition of capital punishment: "Then let the murderers begin!" But such statements are only partially true, whilst for many cases they are nothing but remnants of the old methods of using defamatory penalties which could not fail to make the offender appear infamous in the eyes of the public. It is significant to find this insight already hundred years ago in the writings of a famous criminologist, C. J. A. Mittermaier. "It is easy to understand," he says,[1] "that owing to the penal methods of that time (he alludes to the eighteenth century) persons who had to suffer them came to be regarded as infamous, because nobody could have any confidence in prisoners discharged from prisons that were destructive of all morality and sense of honour." And Mittermaier's master, Feuerbach himself, writes bluntly:[2] "Public opinion in Germany regards infamy not as a consequence of crime but as the result of certain penalties themselves."

Surely those methods of punishment are now things of the past in most countries, but it might nevertheless

[1] Note 1 to his edition of Feuerbach's *Lehrbuch des Peinlichen Rechts* (1847), p. 135.

[2] op. cit., p. 139.

be worth while bearing in mind the fact that the infamous character that now seems inseparably connected with certain violations of the criminal law has often been artificially stamped upon them by ill-sounding names. Nowhere in the sphere of social actions has the power of mere nomenclature made itself more intensively felt than in the realm of penal methods. The amount of human misery caused by terms like "ex-convict" (or the German "*Zuchthäusler*") must be enormous. It might be a profitable task for the sociologist to enquire, with regard to the various types of offences, to what extent the stigma is at present attached to the offence itself and how much of it is simply a consequence of the penalty. Cicely McCall, in describing the case of a woman sent to prison for cruelty to a child, writes:[1] "It was the stigma of having been in prison, not the fact that she had repeatedly struck a child, which reduced her to paroxysm of remorse, as it had reduced her father to fury." And this is certainly not at all an exceptional case. For wide sections of the population an action still receives its moral stamp from the way it is treated by the penal machinery of the State.

All the more has the tendency to be appreciated that is so clearly distinguishable in the Criminal Justice Bill to renounce the use of terms that are nothing but defamatory. It is a stately list of reforms that come under this heading:

In addition to the intended replacement of the term "criminal lunatic" by "State mental patient" (clause 67), the proposed *abolition* of *Penal Servitude*, *Hard Labour* and the *Division* System (clause 33 of the Criminal Justice Bill) deserves our special attention. Not because

[1] *They Always Come Back* (1938), p. 23.

these proposals have come unexpectedly—they belong, on the contrary, to the stock-in-trade of penal reformers. To the uninitiated, it is true, it is just these proposals that may cause some little surprise, since one of the most popular slogans in Penal Reform is "Classification." Why then, notwithstanding, this proposed renunciation of existing methods of classifying prisoners? The answer is: because Penal Servitude, Hard Labour and the Division System have become methods not of classification, but of stigmatization, in other words, methods not for internal differentiation of training, etc., but only for external purposes. "For many years now," the Report on Persistent Offenders of 1932 testified,[1] "there has been no material difference between the conditions under which sentences of penal servitude and sentences of imprisonment are served." In the same year, a German prison governor of wide experience made a forceful attack against the bipartition,[2] in pursuance of a policy which—in spite of much vacillation—had been adopted in Germany since the War. He protested that the difference between penal servitude and imprisonment in Germany existed merely in the mind of the public—and, as a consequence of this, in the mind of the prisoner himself, who, with the exception of the "old lag," suffered severely under the disgrace of a sentence of penal servitude.

It is characteristic of the Nazi Régime that it has revived the old distinction in its full severity, with regard to the treatment of the prisoner in the institution

[1] See *Report*, p. 50.

[2] H. von Jarotzky, "*Fort mit dem Zuchthaus*," *Monatsschrift für Kriminalpsychologie und Strafrechtsreform*, Vol. 22 (1931), pp. 84 et seq.

as well as with regard to the degrading character of penal servitude.[1]

As far as actual participation of convicted persons in the administration of the country or other civic rights and privileges are concerned, a distinction might recommend itself between those rights which the offender would share with the great majority of his fellow citizens, as, e.g., the right to vote, to act as a witness, etc., and those which may lead to a position elevated above most others, as the right of being elected to Parliament or local authorities, etc. Whilst rights of the latter type are properly withheld, deprivation of the former seems, in most cases, to be an unnecessary humiliation.

Penal history knows an extraordinary form of punishment which, though undoubtedly belonging to this connection, cannot well be classified under one of our two categories of degrading penalties: the old penalty of civil death.[2]

In spite of its obvious shortcomings—cruelty of execution, difficulty of classification, and lack of social utility—or perhaps because of them, this form of penalty does not seem to have entirely lost its attractive force for some modern penal reformers. In a stimulating and thought-provoking paper on the crucial problem

[1] See, e.g., Gürtner, *Das kommende deutsche Strafrecht. Allgemeiner Teil* (1934), pp. 89 et seq.

[2] See Wharton's *Law Lexicon*, thirteenth edition, 1925, p. 171; Feuerbach-Mittermaier, op. cit., pp. 135–8; A. F. Berner, *Lehrbuch des deutschen Strafrechts*, fourteenth edition, 1886, pp. 222 et seq. In the principal European countries, this form of punishment was abolished at about the middle of the nineteenth century. As to the U.S.A., see Sutherland, *Principles of Criminology* (1934), p. 539. As to Russia in the middle of the nineteenth century, see Prince Peter Krapotkin, *In Russian and French Prisons* (1887), p. 62.

of "The Alternatives to Capital Punishment" by Colonel G. D. Turner,[1] the suggestion is made to dissect the punishment of murder into two elements, one of them entirely punitive, and the other exclusively reformative, the punitive element being civil death, and the reformative a sentence of indeterminate detention, carried out on a completely new-born human being. "The man convicted of murder," he says, "should be deprived of all but his life. He should be stripped of all rank, degrees, titles and honours. All his property should be forfeit to the State. He should be cut off from his past as completely as if he were actually dead. His very name should be taken from him. Every relationship should be severed. The new life upon which he may eventually embark should be really a new life utterly disconnected with his past." It is difficult not to admire the greatness and boldness of such a conception which, in its first part, seems to have come to us as a remnant and a reminiscence of a more heroic past. And we would agree with it if only we could be sure of finding a sufficient number of murderers of such a terrible grandeur of soul, or perhaps even only of such a hopeless loneliness as would be necessary to endure a penalty of this calibre. Judging from the author's personal experiences, there are but comparatively few who would prove equal to such an ordeal, whilst the great majority would completely fail in this trial. Moreover Colonel Turner, as many other experts, is sceptical of any possibility of accomplishing penalty and reformation at the same time and by one measure; therefore, he wants to settle

[1] *The Fifth Roy Calvert Memorial Lecture*, given in London on November 29, 1938, by G. D. Turner, formerly Assistant Commissioner of Prisons, p. 8.

the punitive part first and definitely, so as to have his hands free for the reformative part. This is not at all new; quite apart from James Mill, whom he quotes as his authority, similar ideas have always been at the bottom of the teachings of the Classical School. Even the double-track system of Preventive Detention owes its origin probably to no less a degree to such ideas, although the desire for protecting society was here certainly stronger than that for reforming the criminal. In the case of the average prisoner—and even the average murderer is for all practical purposes not fundamentally different from the average prisoner—it is, however, not feasible to effect reformation after very severe punishment, whether the latter may consist in flogging or in a sentence of civil death.

Hitherto, we have been dealing with legal provisions the application of which might exercise an *unfavourable* effect upon the offender's social status. Penal law, however, also makes some efforts to single out certain types of offenders for *privileged* treatment. The Continental *custodia honesta* in its various forms and the English *Division System* belong to this category which takes its origin from the special treatment afforded to political prisoners.

The privileged position of the political prisoner has by no means been regarded as a matter of course in penal history. On the contrary, more often than not there has been a strong tendency to treat him with more than average severity. The political history of every country bears equally strong witness to this. The State, or the ruler who identified himself with it, would not tolerate attacks against his security, even if they had been inspired by motives of loftiest idealism. It was only after the French Revolution that the first

breach in the previous system was made by changing the treatment of the political criminal at least in the sphere of international law: whilst political crimes had formerly been almost the only ones for which extradition from one country to another was granted, then the principle of non-extradition of political offenders made its appearance—based upon the belief that political crimes may be of a purely local character; that there may be no common political interests between the States concerned; that the offender is not likely to receive an impartial trial in his own country, and, last but not least, upon the idea that political crimes are on principle not regarded as dishonourable.[1] The suggestion that this latter fact should lead to some sort of privileged treatment even by the State against which the crime was committed was not turned into actual law until the last third of the nineteenth century. The German Penal Code of 1871 (§ 20) provided that, where the judge had the choice—in political cases—between a sentence of penal servitude and one of *custodia honesta* (*Festungshaft*), the former sanction should be permissible only if the crime was proved to have been committed from infamous motives. Similarly, the Norwegian Penal Code of 1902 (§ 24) provides that imprisonment (not only for political crimes, but in general) may be replaced by a sentence of *custodia honesta*, if the special circumstances of the crime indicate that it was not committed from wicked motives. In post-war Germany there was a movement on foot to extend the idea of § 20 far beyond the scope of political crimes by providing that the penalty

[1] See the discussion of the various points in the author's paper: "Some recent Problems in the Law of Extradition" (*Transactions of the Grotius Society*, Vol. XXI, 1935–6).

should be *custodia honesta* instead of penal servitude or imprisonment, whenever the Court held that the offender had been decisively actuated by the conviction that it was his moral, religious or political duty to commit this crime. A corresponding provision had already been introduced into the "Principles regulating the execution of penalties involving loss of liberty" of the 7th June, 1923 (§ 52), according to which a prisoner could, from the very beginning of his sentence, claim far-reaching privileges if the Court, in sentencing him, had explicitly stated that he had been decisively influenced by motives of the nature mentioned above. Provisions of this kind may be regarded as the extreme contrast to contemporary teachings of Pashukanis in Russia who tried to eliminate the very idea of guilt altogether from the Criminal Code.[1] But even those who are, on principle, inclined to admit moral considerations into the penal system[2] may well hesitate at this point before committing themselves too deeply. It is noteworthy that even in pre-Nazi-Germany—now decried as too indulgent, over-individualistic and weakened by extreme relativism and liberalism—those claims encountered determinate opposition from almost every political camp and that the Courts but very seldom included in their judgements a statement of the kind required in the "Principles" of 1923. The Nazi régime, by one of its earliest legislative Actions (Act of 26.5.1933), restricted the scope of § 20 of the Penal Code to a small number of political crimes and provided that even for them *custodia honesta* can be imposed only if the act was not directed "against the weal of the people"—a term the interpretation of which by the present German Courts cannot be doubtful.

[1] See above, p. 21. [2] See above, pp. 20 et seq.

The historical origin of the English *Division System* is undoubtedly connected with the desire for privileged treatment of political prisoners,[1] though it is, of course, well understood that English law does not recognize political crimes as a category in itself. Under the Act of 1877, persons convicted of sedition or seditious libel, etc., were to be placed in the First Division by the Home Secretary. The Prison Act of 1898 created the present system by adding another Division and transferring the task of classification to the Courts. As but little use was made of this power, it was extended by the so-called "Churchill Rule" of 1910 "to mitigate the more degrading conditions of prison treatment for offenders whose crimes do not imply moral turpitude,"[2] and the new rules are said to have been applied to suffragettes and, to a lesser extent, to conscientious objectors. We are here concerned not with the actual differences in prison treatment which exist between the three Divisions, and some other aspects of their proposed abolition, but solely with the fact that the Prison Act of 1898 authorized the Criminal Courts to single out certain offenders for privileged classification in spite of a prison sentence. This could hardly fail to act as something of a stigmatization with regard to all other prisoners. The proposal made in the Criminal Justice Bill (clause 33) to abolish the Division System in favour of exclusive classification by the Prison authorities, means a further narrowing of the power of the Courts to express themselves in a way which may affect the social status of the prisoner. The Bill,

[1] See Sir Evelyn Ruggles-Brise, *The English Prison System* (1922), pp. 71 and 78; *English Prisons To-day*, edited by Stephen Hobhouse and A. Fenner Brockway (1922), pp. 214–24; Leo Page, *Crime and the Community*, pp. 138–9.

[2] See Hobhouse-Brockway, p. 222.

it is true, suggests (clause 45) to grant to the Home Secretary the power to make rules for the special treatment of persons serving prison sentences for sedition, seditious conspiracy or seditious libel, and for other classes of prisoners. Classifications of this kind, carried out within a closed institution instead of an open Court, are, however, obviously much less likely to become known to a wider public. If First Division prisoners—as the Report of the Prison Enquiry Committee put it[1]—are "the aristocrats of the prison world" and, as we may perhaps add, the Second Division represents the upper middle class of that world—there will in future, in any case, be less opportunity for the world outside to admire this "aristocracy" and to despise the "proletariat." The abolition of the Division System is, therefore, to be regarded as a step forward in the direction towards *Classification without stigmatization.*

At present the Criminal Courts have at their disposal two methods that entail but little social stigma or no stigma at all: the *Fine* and *Probation.*

The range of offences for which *fines* may be imposed is so wide and the danger of becoming liable to a fine so common that public opinion has never in general taken a very serious view of this kind of punishment. Each individual case is dealt with according to its own merits; in other words, any social stigma that may arise would be attached exclusively to the offence, instead of the penalty. Or we might even say that the company of so many blameless individuals—or at least owners of motor cars—who have the misfortune to be fined redeems and makes almost fit for good society those black sheep who might become their bed-fellows

[1] *English Prisons To-day*, p. 221.

in the columns of Criminal Statistics by being fined for petty thefts, etc.—whilst with a prison sentence the mechanism of social standardization works in the opposite direction. The following figures[1] are significant: Out of a total of 19,638 persons of seventeen years and over, sentenced to *imprisonment* by Courts of Summary Jurisdiction, 9,751 = 49 per cent had been found guilty of offences of dishonesty, whilst the corresponding figures for persons *fined* were 12,451 out of 651,889 = 1·9 per cent. Such a difference can hardly fail to influence the attitude of the public towards the two groups of offenders. On the other hand, the nuisance value of a fine is also correspondingly low. There is an entire lack of sensation, mysticism and romance around this method of punishment. It is said to be not too difficult to make money out of prison memoirs, but who would buy a book with the title "How I paid my Fines"? Both as regards the public interest it arouses as well as in the amount of scientific study devoted to it, the fine is the Cinderella among penal methods. We should not, however, overlook its great social significance. Of the total number of offenders found guilty by the English Criminal Courts in 1936, about 81 per cent, or between 6 and 700,000 per annum, were subjected to fines.[2] If only one-tenth of them should have left the Court with a feeling of grievance, the injury might have been considerable.

Whilst individualization in the case of prison sentences is always extremely difficult, individual treatment in the imposition of fines is comparatively easy. Nevertheless, in this respect, Criminal Courts in most

[1] *Criminal Statistics for* 1936, Table IX.

[2] See, e.g., *Criminal Statistics for* 1936, p. vi.

countries have not lived up to the requirements. Much too little regard is paid to the financial means of the offender, though the law provides and equity demands it. In case of a prison sentence there are many points besides its length that have to be considered, whilst a fine has hardly any further implications except those connected with its amount. This amount ought, therefore, to be very carefully graded. Such grading is sometimes made impossible by the facts that the statutory maxima are insufficient; in other cases, however, the Courts hesitate to make sufficient use of the discretionary powers granted to them. Of all problems connected with fines it is almost exclusively that of imprisonment for non-payment of fines that has received the necessary attention. Granted its paramount importance, now after this latter problem has found a successful solution in the Money Payments (Justices Procedure) Act of 1935, it might be advisable to take in hand the question of grading. In this connection, special mention ought to be made of some interesting legislative attempts undertaken in Sweden and Finland to improve the technique of the grading system. The main idea seems to be to separate the grading according to the gravity of the offence from the grading according to the economic position of the offender, whilst in other countries both factors are simultaneously taken into account and therefore allowed to obscure each other. As a result of this wrong method, the public may often be left in the dark as to whether the high amount of a fine was due to the character of the offence or to the financial standing of the offender. Under the Swedish Statute of 1931,[1] however, the Court has to apply two

[1] See, e.g., *Monatsschrift für Kriminalpsychologie und Strafrechtsreform*, Vol. 22 (1931), pp. 108 and 739.

different scales: the first set shows a minimum of one unit and a maximum of 120 units, according to the gravity of the offence, whilst the other scale indicates the money value of the chosen unit, according to the economic position of the offender, between 1 and 300 Swedish Kr. For instance, if two persons commit exactly the same traffic offence, the Court may fix the gravity value of it for both offenders at 5 units, but this figure may have to be multiplied in the case of a labourer by 1, in the case of a rich man by 300 Kr., if this would be regarded as an adequate expression of their respective incomes, etc. It may well be that under such a system the Courts will be less averse from imposing higher fines upon the well-to-do classes, because the gravity of the offence will no longer be measured according to the total amount. Even in the list of previous convictions both aspects of the matter might be separated in order to enable the Court which may later have to deal with the offender to know the exact gravity value of the previous offence. This system is again an attempt to carry out classification without unnecessary stigmatization. At present, if the layman reads in the Press that A has been fined 10s., whilst B has to pay £10 for the same traffic offence, his conclusion will be that B must have behaved much worse, whilst in fact the differentiation may only have been due to his better financial position. The Swedish system would render such misconceptions impossible, but, on the other hand, it cannot be overlooked that it may lead to an undesirable betrayal of financial status. There are certainly some petty offenders of poor means who would dislike an innovation that might mean the complete disclosure of their incomes, etc., to all and sundry. A possible remedy

may be to use the Swedish procedure only with the consent of the offender.

An old problem that has hitherto proved wellnigh incapable of satisfactory solution is how to make a fine effective without the threat of a prison term in case of default. The Money Payment (Justices Procedure) Act, 1935, has shown the way to avoid sending to prison persons who, through no fault of their own, cannot pay their fines. This is certainly a step in the right direction; it lends, however, still greater importance to the question: what kind of punishment remains at the disposal of the Courts when dealing with offenders who are unable to pay even a small fine, whilst at the same time their case is regarded as suitable neither for imprisonment nor one of the remaining institutional methods nor for Probation, nor for a simple dismissal? In times of economic depression and unemployment, such cases are all too frequent. This constitutes a definite gap in the penal system, and in some countries attempts have been made to fill it by introducing *labour, compulsory or voluntary, of a non-institutional character.* It was in particular Franz von Liszt, one of the most influential penologists of pre-War Europe, who strongly argued in favour of this method, which, he thought, would preserve the useful kernel of imprisonment, strenuous labour, without its stigma and other concomitant evils.[1] In spite of his efforts, however, the idea has made but little headway. Germany, it is true, after the War provided a legal basis for it, by including in the Penal Code a clause (§ 28b) allowing the offender to pay off a fine by volun-

[1] See, e.g., Franz von Liszt, *Strafrechtliche Aufsätze und Vorträge*, Vol. I (1905), pp. 369, 386 et seq., where some contemporary comparative material is to be found.

tary labour. Apart from this general provision, certain special statutes dealing with petty thefts, etc., in forests and similar offences of a rural character had already long before the War adopted the same course on a compulsory basis. These possibilities have, however, hitherto been very little utilized, except in certain districts as, e.g., Thuringia where in 1931 792 persons paid off their fines by voluntary labour, whilst 2,109 persons were committed to prison in default of payment. In the official Report of the Committee in charge of the drafting of the new Penal Code [1] the following remarks are to be found: "It is here that the plutocratic character of the fine comes to the surface in the most awkward manner. The ideal solution would be to institute public works (*Staatsbetriebe*) which might provide the possibility of paying off fines by voluntary labour without imprisonment. Unfortunately, there are no such public works. Nevertheless, all efforts should be made to offer work to the defendant who, despite his best intentions, fails to pay." One might expect that the changed conditions in the German labour market should have made it easier to provide every offender of this group with ample opportunities of paying off his fine by work for the State. Very little of this kind, however, seems to have happened, though exact figures have not been published. It is in Soviet Russia that the problem has been tackled in a bold and comprehensive fashion. In 1928, and later in 1930, there was embodied in the Penal Code (art. 28) the principle that the minimum term of imprisonment that can legally be imposed is one year, and this made it necessary to find a suitable substitute penalty for the bulk of minor offences. This substitute is compulsory

[1] *Das kommende deutsche Strafrecht, Allgemeiner Teil* (1934), p. 102.

labour without deprivation of liberty, which may be imposed either as an original sentence from one day up to one year (art. 20d, 30), or in the case of non-payment of a fine at the rate of 100 roubles to one month of forced labour (art. 42). This scheme, the details of which were laid down in a number of special statutes,[1] was undertaken with great enthusiasm, as proving the great superiority of the Soviet over the capitalist penal systems, and there were even special Boards established for its execution. Offenders sentenced to more than 6 months' compulsory labour can be sent away from their home districts. Whilst before 1928 the offender got but little less than his full pay according to Trade Union rates, he now gets hardly any pay, but free board and lodgings when it is indispensable for his upkeep. As for the rest, his treatment varies according to the length of his sentence and the amount of work he has to do. This work may be carried out either in workshops, especially set apart for this category of offenders, or in ordinary factories side by side with other workmen. When considering experiments of this kind, the idea that an offender should whenever possible be allowed to pay off his debt to the State by free labour is certainly an admirable one in theory. It is equally clear, however, that the practical difficulties of providing useful work for very different types of offenders and mostly over periods of a few days only must be very considerable, and still more so as the discipline can hardly be as strict as in prisons

[1] For a full report, see Bertram W. Maxwell, *The Soviet State*, p. 179; Professor N. Pasche-Oserski in *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 49 (1929), p. 515. As to the previous stages, see H. Freund, *Das Strafgesetzbuch Soviet Russlands*, etc. (1925), pp. 19, 363 et seq.

or other closed institutions. Moreover, if the scheme is to be of a subsidiary nature only, restricted to those offenders who have failed to pay their fines, the numbers may be too small for any efficient scheme.[1] In Soviet Russia, where forced labour has entirely replaced imprisonment up to one year, it may be technically possible to administer the system. The problem seems therefore inseparably linked with that of the minimum prison term. It would, therefore, be all the better if both could be solved at the same time. It is hardly necessary to emphasize that the short prison sentence, in spite of the great decline brought about in the last decades by Probation, is still much too frequently used. The last published *Annual Report of the English Prison Commissioners*[2] gives the number of receptions with sentences not exceeding one month for the year 1937 as 13,076 men (= 49·4 per cent of the total receptions on conviction) and 2,427 women (= 70·2 per cent of the total), whilst another 6,610 men (=25 per cent of the total) and 605 women (= 17·5 per cent of the total) were committed to prison for terms of over one month, but not more than three months. Thus, 74·4 per cent of the men and 87·7 per cent of the women were received in prison for periods not exceeding three months. This, it is true, does not mean as many different persons, because many offenders are received in prison several times within the same year; moreover, a small amount of these short sentences may be of a purely technical nature only. Nevertheless, the total must still seem much too high in the opinion of all those who no

[1] In 1937: 5,625 men and 1,585 women were received in English prisons for non-payment of fines.

[2] *Report* for 1937, p. 14.

longer believe in the old theory of the wholesome "shock." If the minimum prison sentence could be made three months, a considerable part of this group of petty offenders would become subject to some form of compulsory labour without deprivation of liberty.

The *Report of the Departmental Committee on Imprisonment for Non-Payment of Fines, etc.* (1934), contains the following remarks:[1] "Work Centres. We have also received evidence in favour of the institution of schemes under which persons ordered to pay a fine or other sums of money could be provided with work in some existing public or private institution or at centres specially set up whereby they could earn the amount required. We have not examined the matter closely as it does not appear to come within our terms of reference, but we think it right to put the suggestion on record." It seems a pity that the Committee, which has so admirably solved its proper task, was prevented by its terms of reference from covering the problem of the short prison sentence in its entirety.

The Criminal Justice Bill has taken up the fight against the short-term prison sentence in three different ways: by proposing (1) the gradual abolition of imprisonment for young offenders (clause 27); (2) the establishment of Compulsory Attendance Centres for persons between 17 and 21 years of age and of Juvenile Compulsory Attendance Centres for Children and Young Persons between 12 and 17 years; and (3) by improving the possibility, which already exists,[2]

[1] P. 86, No. 267.

[2] Under the Criminal Justice Administration Act, 1914, and the Money Payments (Justices Procedure) Act, 1935.

but is not much used,[1] of detention within the precincts of the Court or at the police station (clause 40).

Only the third of these proposals refers to adults, and it will probably prove of some use in helping to diminish the number of prison sentences of 1–2 weeks, whilst with reference to non-payment of fines its application will be restricted to very small fines only. In cases, however, where the Courts are now imposing prison terms from two weeks upwards they will hardly regard the new form of detention as a sufficient substitute. At this point, therefore, the Bill contains a gap, as far as adults are concerned, and there may perhaps later be an opportunity for introducing some form of forced or voluntary labour without loss of liberty. The Compulsory Attendance Centres, if successful, might be capable of being developed on those lines, and it might eventually become possible to increase to at least one month, or better still, three months, the minimum term of imprisonment that can be legally imposed.

It is commonly acknowledged that with regard to one type of offender the present method of imposing short prison sentences in default of non-payment of fines is particularly unsatisfactory: the convicted drunkard. Even now, after the passing of the Act of 1935, receptions in prison in default of fines for drunkenness offences numbered, in 1937, 2,924 men and 1,142 women.[2]

[1] The *Criminal Statistics* for 1936, Table IX, give the following figures for Courts of Summary Jurisdiction (excluding Juvenile Courts): 1,376 persons convicted and detained in Police Cells, out of whom 1,320 were detained for not longer than the day of conviction. "Excluding cases of detention within the precincts of the Court, the number of persons actually detained in Police Stations or certified Police Cells was 603."

[2] *Prison Commissioners' Report*, 1937, p. 9.

In Sweden, where the replacement of prison in default of fines by compulsory labour has not been adopted, an Act of the 9th of April, 1937, provides that instead of sending the defaulter to prison the fine is simply written off, if he has honestly tried to pay, or if the fine is not higher than 25 Kr. This, however, applies to drunkenness offences only if the offender had not already been fined three or more times within the previous two years for drunkenness. Otherwise the Board for the treatment of drunkards has to consider his committal to an institution for inebriates.[1]

[1] See the full text of the Act in French in the *Recueil de Documents en matière pénale et pénitentiaire, janvier* 1938, pp. 72 et seq.

CHAPTER V

THE SOCIAL IMPLICATIONS OF THE PRINCIPLE OF LESS ELIGIBILITY
(Continued)

THE problem of social stigma is particularly complicated in the case of *Probation.*

There is hardly anything in the theoretical conception of Probation or in its practical application that can be regarded as humiliating, particularly so in the case of children and young persons. The adult probationer may sometimes resent the interference of the Probation Officer in his private affairs, and conditions imposed in the Probation Order—judicious and indispensable as they usually are—may occasionally be somewhat detrimental to any reputation that the individual concerned may enjoy among his family or neighbours. The latter applies not only to the American offender who is reported to have had recently imposed upon him the condition that he should hold the hand of his wife during a visit to the cinema.[1] A two years' dance-hall ban on a girl of 18, a cinema ban or curfew on a boy of the same age, a condition that the probationer shall not reside or work in London, or that he or she shall not visit a public-house or a certain store during the probation period, or even that he shall join the local branch of the Society for the Prevention of Cruelty to Animals—all such restrictions of personal liberty may affect the social status of the probationer. This is in no way a reflection upon the appropriateness of such conditions, but it is always good to face the

[1] *The Times,* November 17, 1936.

facts as they are. Humiliating conditions, by the way, might perhaps be virtually null and void as violating the Bill of Rights which prohibits any "cruel and unusual punishments." When, long ago, a defendant was sentenced to ask the prosecutor's pardon and to advertise this in the Press, the sentence was declared null and void.[1] In the *Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction* mention is made of a condition imposed upon a man of forty-two charged with stealing a handbag from his wife that he must not speak to his wife for twelve months. With reference to German Law the present writer once tried to lay down the *argumentum a fortiori* that as part of a Probation Order no conditions must be made that might lead to greater restrictions of the liberty of the individual than the execution of a prison sentence would involve, and even among those conditions which conform to this rule only such could be tolerated as are in conformity with the essential aims of Probation.[2] It is true that this *argumentum a fortiori* is not directly applicable to English law, because here the close connection between Probation and a prison sentence, 'characteristic of the Continental system,[3] does not exist. Nevertheless, the test mentioned before may sometimes prove of some value.

Even without any special conditions being attached to a Probation Order, the mere fact that a person has to pay regular visits to his Probation Officer or to receive his calls in his home may, in an environment

[1] Kenny, *Outlines of Criminal Law*, fourteenth edition, 1933, p. 501.

[2] See *Die Grundrechte und Grundpflichten der deutschen Reichsverfassung*, Vol. I (1929), pp. 330 et seq.

[3] See below, p. 139.

not endowed with an exceptional amount of wisdom and tact, make him the object of many misplaced jokes that cannot but render him hostile towards the Probation Officer, thereby greatly increasing the latter's difficulties.

Legislation, on the other hand, has certainly gone a long way in its efforts to remove any social stigma from Probation—as far as this aim can at all be achieved by means of legal provisions. It is a matter of considerable interest to see how far the law of Probation, as it is now in existence in the various countries, is the product of legal considerations of a mainly technical character, or how far such legal considerations had to give way to the weight of social factors. There are two stages at which the stigma may be withdrawn from the Probation system: first, when the case is dealt with in Court, and secondly after successful expiration of the Probation period.

As is well-known, there are available at least three different methods of applying the principle of binding over with or without Probation in Court. One method insists upon a conviction and the imposition of the sentence, whilst the carrying out of the sentence is conditionally postponed. Under this system (which is in use in France, Belgium, Russia, etc.), after successful expiration of the Probation period, as the Belgian Act of 1888 puts it, the conviction is regarded *comme non avenue*, as non-existent, which means, for instance, that the offender can for all practical purposes claim to enjoy a completely stainless record.[1]

German law, up to now, has used a system under which verdict and sentence are pronounced as usual, whilst—in contradistinction to the Franco-Belgian

[1] See Roux, *Cours de droit criminel*, Vol. I, p. 502.

legislation—even successful expiration of the Probation period does not wipe out the fact of the sentence in the records, apart from the possibility of rehabilitation, which will be discussed later. The Commission for the drafting of the new German Code, however, proposes a change which constitutes a slight advance towards the Anglo-American system:[1] the Court shall, as at present, pronounce its finding of guilt and record a conditional sentence, which latter, however, instead of being pronounced in public, shall be conveyed to the offender in writing. If the Probation period is successful, the record of the sentence shall be destroyed. This compromise system, it is believed, would rob the sentence of its stigma, without the alleged disadvantages of the Anglo-American system.

Anglo-American Probation law differs profoundly from all other legislation[2] in so far as it prohibits the passing of a conditional sentence. More than that, the English Probation Act of 1907 enables the Courts of Summary Jurisdiction to place an offender under Probation even "without proceeding to a conviction." On the other hand, a Probation Order whether preceded by a conviction or not, in any case has to appear for ever in the list of previous convictions, even if the offender has observed all the conditions imposed upon him.

When trying to disentangle the manifold problems behind these differences, we are at once confronted

[1] See Gürtner, op. cit., pp. 123 et seq.

[2] The Austrian Juvenile Court Act of 1928, §§ 12 and 13, provided the same method of postponing sentence instead of imposing small fines or short prison sentences, and even in Germany it has been introduced *praeter legem* by some magistrates of Juvenile Courts (*Deutsche Justiz*, 1938, p. 827).

with the following inconsistency between the legal and the social factors involved: To the orthodox lawyer, a conviction not followed by the pronunciation of an, at least, conditional sentence is truly abhorrent for several reasons: the idea of deterrence as well as the idea of just retribution seem to demand that the offender ought to be definitely told which evils he would have to suffer if he should not do well during his Probation period. The simple announcement that a penalty vague in kind and duration would be the consequence of a breach of Probation is not regarded as sufficiently impressive. Moreover, from the point of view of criminal procedure it is clearly a very difficult task for the Court to find the proper sentence perhaps one or two years after the finding of guilt. It is, therefore, hardly surprising that English Criminal Courts, on the whole, are much more inclined, instead of punishing the offender for his original offence, to impose a fine for the breach of his recognizance, or to take any other course that might then seem appropriate without paying much regard to the original offence. This is called "a mistaken practice" by the *Report on the Social Services*,[1] but its roots are clearly to be found in the present law. Even the occasional practice mentioned in the Report of a Judge making for future reference a note of what he considers the appropriate sentence[2] can hardly solve the problem, since the view of the Judge who tried the offender for the original offence cannot be binding upon the Court which has to deal with him after a breach of Probation.

All these objections of the legal profession against the present system, however, have in Anglo-American law had to retreat before the weight of social factors. The

[1] See p. 55.

[2] *Report*, p. 56.

probationer's progress during the Probation period and in his later life, it is feared, would greatly be hampered if he had to bear the stigma of a sentence passed upon him, be it even only a conditional one.[1] The efforts to de-stigmatize the Probation Order went even so far as to renounce the very term conviction—a method which Lord Darling—in a well-known dictum—has called "unscientific, thoroughly illogical, and merely a concession to the mere passion for calling things what they are not."[2] As the reverse of the medal, however, English law is less reluctant than some Continental legislations to insert these de-stigmatized Probation Orders later in the list of previous convictions.

In view of the fact that the Criminal Justice Bill (clause 18) proposes the abolition of the right, at present given to Courts of Summary Jurisdiction, to make a Probation Order without a conviction, and considering the fairly widespread disapproval with which this part of the Bill seems to have met, it may be appropriate to examine the position somewhat more closely, all the more as this is a problem particularly suitable for demonstrating the deeper roots of the conflicts between the lawyer and the social worker. In a discussion of the problem that took place a few years ago between Lieut.-Colonel A. C. E. Willway and Miss Madeleine J. Symons, and which is published in the *Journal of the National Association of Probation Officers*,[3] the former, accepting Lord Darling's view that a

[1] Supporters of the Continental system are, however, not entirely missing among English experts; see, e.g., *Report of the Prison Commission for* 1925–26, p. 51.

[2] See *Oaten v. Auty* (1919), 2 K.B.D., 278.

[3] *Probation*, April 1937, pp. 117 et seq. See also the *Report on the Social Services in Courts of Summary Jurisdiction*, 1936, pp. 72 et seq., and 146.

finding of guilt without a conviction is a contradiction in itself, followed Mr. Justice Avory's reasoning that the words of the Act of 1907 "without proceeding to a conviction"—if not to be regarded as entirely senseless—can be interpreted only as meaning "without *recording* a conviction." But—Colonel Willway adds—"a Court of Summary Jurisdiction, not being a Court of Record, never does record convictions in a formal way. What is done is to make a note in the Court Register for future reference. . . . Should the probationer unfortunately appear in Court again on some fresh charge, he will find his previous binding over on Probation faithfully recorded among any other convictions he may have. Surely there will be general agreement that this is as it should be. . . ."

It does not seem necessary to take sides in the legal arguments involved. It would appear, however, that a system of criminal procedure which keeps the conviction apart from the finding of guilt is well conceivable and may be acceptable even to the most legalistic mind, without violating the rules of logic. The following interpretation offers itself spontaneously without requiring any legal sophistry: Whilst the finding of guilt merely expresses the view of the Court that, according to the facts proved, a breach of the criminal law has been committed, conviction means more, namely a solemn statement of disapproval, as a consequence of which a certain course of action has to be taken against the offender. On the other hand, a finding of guilt without a subsequent conviction would indicate that such an unequivocal vote of censure is being withheld, in spite of the existence of a formal breach of the law. What seems to be illogical in the Probation Act of 1907 is perhaps not so much its distinction between

finding of guilt and conviction as the fact that the same legal action, namely the issue of a Probation Order, may be taken under the Act as a consequence of a mere finding of guilt as well as of a conviction. If there is to be a real distinction between these two methods of Court procedure this difference should express itself in terms of a difference of *consequences*. The more hopeful view of an individual case taken by the Court when making a Probation Order—it might be argued—should *always* be clothed in the legal form of a finding of guilt without a conviction, quite independently of the rank of the Criminal Court that has to deal with the case. On the other hand, a conviction—expressing a higher degree of disapproval—should never be followed by the making of a Probation Order, since this would hamper the proper understanding of the distinction.

The Criminal Justice Bill—as already indicated—proposes to abolish the difference in procedure by adapting the procedure of the Courts of Summary Jurisdiction to that of the higher Courts (clause 18). To compensate for this loss of social status to be inflicted upon the probationer, it is further proposed to enact that any disqualifications or disabilities normally imposed by the law upon convicted persons shall not apply to persons placed on Probation, and that the latter shall likewise not suffer by any provision that may allow for severer punishment in the case of persons already convicted (clause 20).

Whether the legislator chooses this course or whether he prefers to adapt the procedure before the higher Courts to the summary procedure—this is in itself merely a minor problem of legislative technique. The only question that really matters is whether the community at large has not already become too familiar

with the idea that a Probation Order, in the majority of cases, involves no conviction, with the consequence that such an Order, if in future based upon a conviction, would necessarily be taken as implying a stronger vote of censure. If this be so, the intended innovation might expose many future probationers to unfortunate losses of social status. Public opinion is usually slow of comprehension and finds it difficult to adapt itself to sudden legislative changes. Once having grasped the possibility that Probation can be applied without a conviction, society may continue for a considerable time to regard the use of a formal conviction as proving the greater seriousness of the offence. At present it seems to be an established fact that persons who are convicted have to suffer a much greater social stigma than those placed under Probation without a conviction. The Army, Navy, and many employers are said to refuse to keep or to take on men after conviction, whilst they may be inclined to show greater leniency in the case of Probation without a conviction.[1] Emigration to certain countries is entirely prohibited for persons convicted.[2] This may apply even to cases where the full facts of the offence are known to the authorities or employers respectively, so that it is clearly proved that

[1] See Miss Madeleine Symons, loco cit., p. 119; *Howard Journal*, Spring, 1939, pp. 147 and 190.

[2] See Mr. John A. F. Watson's useful survey, op. cit., pp. 259 et seq. According to most of the Immigration Acts of the British Dominions persons convicted of any crime involving "moral turpitude" are prohibited immigrants. As Mr. Watson points out, there is no definition of "moral turpitude." The *Fourth Report of the Children's Branch*, Home Office, 1928, p. 32, however, indicates that every petty theft falls under this classification and—as the *Report* explicitly states—disqualifies for emigration to the Dominions.

their attitude is chiefly determined not by the seriousness of the offence, but by the method of treatment used by the Court.

Much as we may dislike the whole idea of a social stigma being attached to methods of treatment instead of to the offence itself—if stigma there must be—these facts we have to consider at present as weighing against the proposed change. Colonel Willway[1] instances the case of a prospective employer who may ask: "Have you ever been convicted?" and who would be deceived if the candidate—having been placed under Probation without a conviction—answered in the negative. It is submitted, however, that prospective employers should be prohibited by law from putting such questions *ad libitum* without any time limit. It is not the purpose of the Criminal Law to act as permanent guide in the labour market, nor is it really suitable for this task. The mere fact that a person has received a certain sentence for a certain offence is of little significance unless the details of the case and the reasons are fully known which induced the Court to impose this and no other sentence. And it is just these details that are, as a rule, withheld from the private citizen. As he cannot, therefore, know everything that might be of importance, he should be told nothing. Possible methods of reform might be to make the putting of such indiscreet questions itself an offence, or to grant a legal right to answer them in the negative after the lapse of a certain period of time—both of which would have to be supplemented by a system of Rehabilitation.[2]

In the recent parliamentary debates the Home Secretary expressed the view that employers, the Fighting Services, etc., would soon adapt their

[1] loco cit.

[2] See below, p. 150.

Questionnaires to the changed legal position with regard to Probation, no longer asking their prospective employees, etc., whether they had previously been convicted, but whether they had been charged and what had been the result of the charge. If such a change could be quickly brought about, this would surely be of the greatest help in overcoming the difficulties foreshadowed by the opponents of this innovation.

There is, however, still another and more serious objection to the present system besides the legal difficulty of distinguishing between conviction and finding of guilt: It is the apprehension, expressed by the Home Secretary in the course of the proceedings of the Standing Committee of the House of Commons, that the appropriate relative proportion between Probation and *fine* might be unduly changed in favour of the former, if the probationer should always enjoy exemption from conviction, whilst a person who is fined would have to suffer all the disadvantages of being convicted. The fine, it is said, is, after all, intended for offences of a less serious nature than those for which Probation is used.[1]

In reviewing the main points of our discussion of the social stigma connected with Probation, we might perhaps be tempted to regard it as a weakness of the present English law that, from the outset, it has been too lenient in its treatment of the offender before a Court of Summary Jurisdiction by renouncing a conviction. On the other hand, there has been too little de-stigmatization of the successful probationer, since the mere fact of his having once been placed on Probation can be used against him after many years.[2]

[1] See *The Times* of February 22, 1939.

[2] For a fuller discussion of this point, see below, pp. 150 et seq.

The question of the possible stigma of a *Borstal* sentence or of a committal to a Home Office School would need a separate investigation. "There is very little stigma attached to an approved School, but the stigma of Borstal is very great indeed," writes Mr. B. Q. Henriques.[1] The second part of this statement has fully been borne out by an investigation of about 1,000 records of Borstal boys and girls which the present writer has been privileged to carry out and the results of which he hopes to publish elsewhere.[2] There is, however, little doubt that public opinion, here much more than with regard to the ordinary prisoner, is capable of being educated towards a better understanding of the problems involved. The steady progress which is being made in this direction is mainly due to the wise and sympathetic help offered by the authorities concerned. Besides many other methods, particular mention should be made of the newly established system of Borstal Voluntary Committees that are destined to supply each lad on discharge with a friend who takes the place of his housemaster. For the special purpose of fighting the social stigma, the members of these Committees who may hold influential positions in everyday life will be particularly suited.[3]

Another innovation which is likely to prove of far greater significance than would be expected from a slight change in name is the fact that the recent Borstal Institution in Suffolk is officially called "H.M. Hollesley Bay Colony" instead of Borstal Institution.

[1] *Indiscretions of a Warden* (1937), p. 258. See also John A. F. Watson, op. cit., p. 221; *Howard Journal*, Spring, 1939, p. 150.

[2] See also *Report of Prison Commissioners for* 1937, pp. 38 et seq.

[3] See *Reports of the Prison Commissioners for* 1936, p. 45; 1937, p. 42.

This may be regarded as symptomatic of the desire of the authorities to get rid of certain traditional prejudices against Borstal and, at the same time, to retain all that has successfully withstood the trial. It must, however, inevitably take some time until this aim of de-stigmatization will be reached. Meanwhile, new difficulties may arise from another quarter, and here it may become necessary to refer to a provision of the Criminal Justice Bill which has lately encountered some criticism. Bearing in mind the important changes which have taken place within the last thirty years in the type of Borstal Institutions as well as in that of their inmates, it would seem fully justified that the Bill (clause 31) undertakes a new formulation of the fundamental provisions with regard to Borstal. It is proposed to replace the words, used in the Prevention of Crime Act, 1908, for defining the type of young offender suitable for Borstal, as of "criminal habits or tendencies," by the much less stigmatizing phrase that "by reason of the offender's character or habits" it is expedient that he should undergo a period of discipline in a Borstal Institution. And instead of "detention" in a Borstal Institution, the Bill speaks of "training." Quite apart from the point stressed by the critics that the phrase "character or habits," which makes a Borstal sentence expedient, is somewhat vague,[1] there seems to be some danger that such a lowering of the requirements may bring to Borstal a type of boy or girl for whom even the present Borstal is not yet sufficiently de-stigmatized.

Continental law has developed an institution the aim of which is to repair—after the lapse of an appropriate

[1] See *The Penal Reformer*, January 1939, pp. 11 and 14; Miss Margery Fry, *Fortnightly Review*, January 1939.

period of quarantine—the injury done to the offender's reputation by certain forms of punishment. This institution is called *Rehabilitation.* Its motherland is France, whilst it has not been accepted in the English legal system.[1] The reason—or at least *one* reason—for this difference becomes apparent from our previous remarks on the use of degrading forms of punishment in the European countries. There we have found that English law and the laws of some American states differ from most other countries in so far as they show a greater inclination to terminate losses of civil rights, etc., at the expiration of the principal sentence, whilst elsewhere such a deprivation lasts for many years after discharge from prison. Far-reaching as the consequences of this contrast certainly are, they seem, nevertheless, hardly sufficient to offer a completely satisfactory explanation of the absence of that institution in English law. The social implications of rehabilitation cover a much wider ground than the mere restoration of civil rights, etc., lost according to the Forfeiture Act of 1870 and similar statutes. Their aim, at least in its French form, is—if certain conditions are fulfilled—to destroy, to undo the very fact of the conviction, as far as it is possible to reach this aim by legal measures.

French law, which first conceived the idea of rehabilitation in the second half of the seventeenth century, has consistently been stressing this point of view by making use of phrases like, *la loi et le tribunal effacent la tache de votre crime* or *la réhabilitation efface la condemnation et fait cesser pour l'avenir toutes les incapacités qui en résultaient.*[2] It is, in the words of a French

[1] As to the United States of America, see Sutherland, *Principles of Criminology*, p. 543.

[2] Art. 634, *Code d'instruction criminelle.*

authority,[1] *la restitution du condamné dans son honneur et bonne renommée*. In some respects, it is true, rehabilitation affects only the future, not the past of the offender, i.e., if his marriage had been dissolved on account of his conviction, the divorce is not regarded as null and void, and he does not receive back his office, his decorations, etc., which he had lost.[2] A peculiar feature of the French system is the existence of two different forms of rehabilitation, the *réhabilitation judiciaire* and the *réhabilitation de plein droit*, according to whether it is granted upon application by special decision of the Court or automatically as a matter of right. Apart from this duality most Continental countries, as can be gathered from the recent survey initiated by the International Penal and Penitentiary Commission,[3] have taken over the main features of the French system. There is no need to go into any details; it suffices to say that the effect of an act of rehabilitation usually consists in a deletion of all entries regarding the conviction in the records.[4] Before this stage of complete deletion is reached, there is sometimes an intermediate stage where the entries are retained, but have to be kept secret to all except a limited number of authorities, with the consequence that in his relations to other authorities as well as to private persons the offender passes as unconvicted. Such complete deletion of entries, commendable as it is for securing complete safety from indiscretions, can obviously create serious

[1] Roux, *Cours de droit criminel*, Vol. I, p. 525.

[2] Roux, *Cours de droit criminel*, Vol. I, p. 532.

[3] See *Recueil de Documents en matière pénale et pénitentiaire*, Vol. IV (*spécial*), *juillet* 1935: *Les Systèmes pénitentiaires en vigueur dans divers pays*.

[4] See, e.g., § 5 of the German Act of April 9, 1920 (*Straftilgungsgesetz*). French Act of August 5, 1899.

handicaps for the purpose of adequate penal treatment as well as for criminological research, if the offender is re-convicted after the destruction of the register. It is indispensable for a proper handling of a criminal case to know the complete criminal history of the offender. From this point of view, the English system of retaining for ever all previous convictions, including Probation Orders, in the Records is certainly superior, but it involves a serious disadvantage in the form of an official perpetuation of the social stigma. This is only one of those frequent inconsistencies between the justifiable interests of the individual and the need for a scientific study and treatment of crime. It is difficult to find an entirely satisfactory solution of this problem. One might suggest, for instance, that the Court which has to deal with the offender again after his rehabilitation should be permitted to take into account his previous offence without disclosing it publicly. Such a procedure, however, might in some cases render it impossible for the community to appreciate the justness of the course which the Court has taken. The best compromise solution seems to be the following: Two stages should be created with different time limits: After the expiration of the shorter period information as to previous convictions should be given exclusively for the purposes of criminal proceedings, whilst the expiration of the longer period would make a complete destruction of the record compulsory. This final stage, however, should be reached only at a time when the knowledge of the previous conviction can—for the average case—no longer be regarded as essential in the interests of the proper handling of future criminal proceedings. Inseparately connected with this system of rehabilitation should be a prohibition to every

prospective employer to require more information than that which would be officially available according to this scheme. In Germany, a decree of the head of the *Reichswirtschaftskammer* of August 4, 1938,[1] complains that German employers of labour are trying to circumvent the Act of April 9, 1920,[2] by requiring candidates for jobs not only to submit certificates of good conduct, but also to give full information in writing as to their previous convictions, including those no longer mentioned in the certificate issued by the police. This attitude, the decree emphasizes, is not only incompatible with the spirit of the law, but also harmful to the State in view of the present scarcity of labour, which makes it imperative to employ workers in spite of their convictions. Employers are told to take into account in the first place the technical suitability of the candidate, and to pay attention to previous convictions only in those exceptional cases where the nature of the offence makes an employment clearly impossible.

It would be an important step towards rehabilitation if provisions were made prohibiting the forcing of a *witness* to disclose convictions that are without any significance for the trial.[3] The German Code of Criminal Procedure provides (§ 68a) that questions of this kind are permissible only if indispensable in deciding whether the witness can legally take an oath and is worthy of

[1] See *Zeitschrift für die gesamte Strafrechtwissenschaft*, Vol. 58, p. 805.

[2] See above, footnote 4, p. 151.

[3] As to the present legal position and the history of the problem, see Halsbury, *Laws of England*, Vol. IX (second edition, 1933), p. 191; Vol. XIII, p. 761; John Henry Wigmore, *A Treatise on the Anglo-American Law of Evidence*, §§ 519 et seq., 983–4.

belief. This makes it possible to avoid the disclosure of convictions irrelevant to the matter.

A similar problem is whether it should be lawful to disclose the previous convictions of another person in public if it is done without any benefit to society. In English law and most American jurisdictions the truth of such a publication is always a complete defence in a civil action, whilst in a criminal action the prisoner must prove that he published the libel for the public benefit.[1] In some states of Australia and in Illinois, however, the civil law has been assimilated to the principles of criminal legislation.[2] Whilst the question is admittedly difficult, surely it should not be taken as the guiding legislative principle that "it is part of the punishment of a wrong-doer that he can never escape from his misdeeds."[3]

Apart from a general system of rehabilitation as outlined above, there should be special provisions for the juvenile offender.[4] The Italian Juvenile Court Act of July 20, 1934, is remarkable for its thorough way of dealing with the rehabilitation of juvenile delinquents (see art. 24).[5] As soon as such an offender reaches his eighteenth year, a comprehensive investigation of all aspects of his case is to be made, and if the result is

[1] See W. Blake Odgers, *Libel and Slander* (sixth edition, 1929), p. 157; Professor G. W. Paton, *Illinois Law Review*, Vol. XXXIII, February 1939, pp. 669 et seq.

[2] See Professor Paton's article, loco cit., p. 679.

[3] Odgers, loco cit.

[4] See *Principles applicable to the Functioning of Juvenile Courts and similar Bodies, Auxiliary Services and Institutions*, published by the League of Nations' Advisory Committee on Social Questions (Geneva, 1937), p. 18.

[5] There are, in addition, the general provisions of artt. 178 et seq., of the Italian Penal Code for adult offenders.

satisfactory he receives his official rehabilitation; otherwise the investigation has to be repeated after the completion of his twenty-first year. Rehabilitation has the effect that no mention is made of previous convictions in certificates of conduct, unless the latter are needed in criminal proceedings. There is a similar possibility for adolescents who had been committed to reformatory schools as being in moral danger (artt. 25 and 31 of the Act).[1]

This Act had a precursor in the Austrian Juvenile Court Act of 1928, which provided that information about certain minor convictions of juveniles and in particular about suspended sentences was to be given to no other than judicial authorities and to the police for purposes of judicial proceedings, moreover, that even prison sentences of no more than two years duration must not be included in certificates of conduct after five years of good behaviour (art. 44).

With special reference to Probation, the further suggestion has repeatedly been made that after the expiry of the period of Probation the successful probationer should be brought before the Court and receive a solemn rehabilitation.[2] The legal consequences of such an act may vary according to the age of the offender.

Whilst the details of all these attempts to solve the problem may be open to discussion, the institution of rehabilitation as such is one that would seem to recom-

[1] According to the Juvenile Court Act of Geneva, of May 15, 1935, convictions of children and juveniles (i.e. 10–18 years)—except for very serious crimes—must not be entered into the records.

[2] See Mr. M. A. B. King Hamilton's letter to *The Times* of January 23, 1939, and Professor Grace Abbott, *The Child and the State* (1938), Vol. II, p. 488.

mend itself to every progressive legislation as the best possible proof that the State and public opinion no longer *condamne à perpétuité*.

There are, of course, voices wholly opposed to the idea of rehabilitation. For instance, Pareto, that inveterate hater of progressive penal methods, writes:[1] "Non-registration of sentences in judicial records is an excellent device for misleading the honest citizen, who may so be induced to admit the honourable criminal into his home or at any rate employ him, so giving him an opportunity to resume his praiseworthy activities." And he is lucky enough to find support for his views with the *Union Suisse pour le Sauvegarde de Crédits* in Geneva, from which he quotes: ". . . Business men . . . insist on knowing with just whom they have to deal. Jurists writing on the question claim that individuals convicted of crimes should not be reminded of them, and that point of view is shared generally by persons interested in sociology or social work and not connected with business. There is no basis for reconciling the two views. . . ." This again proves the need for creating some kind of common responsibility for discharged prisoners.[2]

In this connection mention should be made of another feature of English Criminal Law that strengthens the tendency to perpetuate the reminiscence of past crimes: English common law knows *no general time limit* for prosecution and punishment. A criminal—with the exception of the petty offender—may be brought to justice twenty or thirty years after the commission of his crime—Sir James F. Stephen even records the story of a man who was prosecuted in 1863

[1] *The Mind and Society*, Vol. III (1935), § 1716, footnote 1.

[2] See above, p. 95.

for a theft committed sixty years before[1]—whilst all other legislations have imposed time limits for both conviction and execution of sentences.[2] The penological justification for these self-imposed restrictions is of a threefold character. First, after the lapse of so many years the offender himself is no longer the same person, and a penalty meted out to him would in fact fall upon another human being than the one for whom it was intended. Secondly, the indignation of the public, aroused by the crime, has calmed down, and the original desire for retribution may have disappeared. A third factor is the procedural difficulty of securing reliable evidence at a time when the memory of the witnesses and of the offender himself may have undergone considerable deterioration.

The Russian Penal Code has pushed the first two considerations to an extreme which is characteristic of its political philosophy by providing that an offender shall not be punishable if, at the time of the prosecution or of the trial, either the crime has lost its socially dangerous character in consequence of a change in the social-political situation, or the criminal himself is no longer to be regarded as dangerous to society (see art. 8). Surely, this was in entire harmony with the fundamental tenet of Russian Criminal Law at least before 1937, that it is not the commission of an act which fulfils the technical requirements of the Code, but only the quality of social dangerousness that justifies punishment (see the official note to art. 6 of the Code).

[1] *History of the Criminal Law of England*, Vol. II (1883), p. 2.

[2] See, e.g., Code d'instruction criminelle, artt. 635 et seq.; German Penal Code, §§ 66 et seq.; Italian Penal Code, artt. 157 et seq.; Russian Penal Code, artt. 14–15.

Among the many forms which the stigmatizing of offenders may assume there is one which is particularly harmful: it is the expulsion of young delinquents from secondary schools. This, by spoiling their chances of obtaining a better education, leaves behind disappointment and bitterness and can only lead to further delinquency. Of more than average intelligence, but highly-strung and unstable as such adolescents usually are, and sometimes even suffering from a not yet diagnosed form of mental disorder, which may pass away in a few years' time—such offenders need particularly careful handling. Instead they receive the shock of expulsion from school. The school authorities, it is true, may have no other choice on account of the strong prejudices at present held by the parents of the other pupils. Nevertheless, it may perhaps need only a slight pressure to convince the latter that they are confronted with a problem that may, one day, be their own. It seems that some courageous efforts are already being made in this direction. *The Times* of February 18, 1939, reports the case of a boy of 17, found guilty of repeated shopbreaking and placed on Probation, whom the headmaster was prepared to keep at the school. Though this was certainly the right thing under the circumstances, even the mere appearance of class distinctions must, of course, carefully be avoided. In the quoted case the Recorder is reported to have first asked: "How can I send to prison someone who is hungry and has stolen, and not send this boy?" The answer may be that for *both* cases prison does not seem the right place.

The complete elimination from the penal system of any stigma attached to it will never be achieved by one-sided efforts on the part of the penal administrator

and penal reformer, by sentimental humanitarianism, or mistaken glorification. It is the behaviour of certain types of offenders and of certain sections of the Press that provide the biggest obstacles. Whilst it is distinctly wrong to treat every law-breaker as an inferior human being who ought to be content with the crumbs that fall from the table of the community, on the other hand, glorification of the criminal either by himself or by the Press is the last thing to be desired. Both are equally apt to stiffen the attitude of the public. Surely, it is beyond the limits of toleration when a woman, having been convicted of petty theft, is put in the position of being able solemnly to declare that her conviction would not interfere with her social activities and that she would continue going to parties. This she might well have done, but to enable her to advertise it publicly cannot fail to do immeasurable harm.

There seems to be little clarity or agreement at present as to the extent to which some sort of social stigma is really indispensable for maintaining the necessary efficiency of the penal system.

Pareto, whose penological wisdom—as proved by his furious attacks on the idea of Probation, etc.—was not much superior to that of a medieval witch hunter, abhors anything that might diminish "the aversion from crime that the civilized human being instinctively feels"[1]—"civilized human being" meaning a well-to-do professor of political economy living quietly by the shore of the Lake of Geneva. But even in the view of another sociologist, F. Znaniecki, who knows a good deal more about crime, "the doctrine that crimes ought to be condemned and repressed without

[1] Pareto, *The Mind and Society* (edited by Arthur Livingston), Vol. III (1935), p. 1284, § 1848.

any antagonism towards criminals as people is a fiction altogether unrealizable."[1] He could perhaps have referred to the evolution of the Soviet Code as a perfect example to the point. Sanford Bates envisages a time when, in the case of many offenders, any other form of punishment will be effectively replaced by the loss of right to play their part in the administration of the country.[2] Sutherland and Malinowski have pointed out that the really effective element in punishment is not so much to be found in the legal penalty itself as in the reprobation of the social group.[3] There is some element of truth in all these observations, and certainly no single solution is likely to be applicable to all cases. Nevertheless, the combined experiences of the history of penal methods as well as of modern penology would seem at least to teach this: Any social stigma that society finds indispensable for its protection should be attached not to the penalty but to the crime—in other words, it should follow, if at all, from what the offender has done, not from what the State did to him. A person should not be artificially made an outcast because of the punishment he has undergone. This aim cannot be reached by legislative steps alone, but if the law proceeds cautiously on this way by removing any traces of degrading penal treatment and discrimination, it may be expected that the better part of the public will follow suit. The ground is already being prepared for this change by the admirable work of prison visitors, voluntary teachers, Borstal Voluntary Committees, and similar bodies.

[1] *Social Actions* (1936), p. 359.

[2] Sanford Bates, *Prisons and Beyond*, p. 290.

[3] Sutherland, op. cit., p. 342; B. Malinowski, in his Introduction to Dr. Hogbin's *Law and Order in Polynesia* (1934), pp. xxx–lxvi.

As already emphasized above, such efforts at removing the unnecessary stigma are in no way incompatible with the view that the moral basis of the penal system must be strengthened. It is the wrong type of morality that needs the backing of a social stigma. Even violations of the ethical code itself can be disapproved without ostracizing the offender morally. The sociologist—it is rightly stressed in the Howard League's International Survey, *The Accused* (1937)—"must rid himself of the habit of moral indignation . . . and regard wrong-doing of every kind as an object of detached study with a view to its prevention"—and so, too, must society at large.

Even apart from the legal provisions so far discussed and within a penal system where there is not the slightest intention of stigmatizing or of differentiating according to social status there will inevitably be found certain sections that successfully resist all levelling efforts. As far as the work of the *Criminal Courts* is concerned, we have seen that in the imposition of *fines* insufficient account is taken of the social and economic position of the offender. It is otherwise with sentences involving loss of liberty. Here the severity of the law falls sometimes much more heavily upon better class law-breakers—apart from murder and manslaughter. A first offender sent straightaway to a convict prison usually turns out to be a solicitor or other professional man, and the percentage of sentences of penal servitude imposed for fraudulent conversion, etc., is particularly high. For shorter terms of imprisonment, the Division System may occasionally have been used to soften middle-class sensitiveness. On the other hand, the complaint is sometimes made that for better-class boys and girls it is very rare to be sent to Borstal or a Home Office School.

As far as classification by the prison authorities is concerned, there is no evidence to show that the system actually favours this or that social class. It is probable that the percentage of professional men in the Star Class is higher than their share in the total population of convict prisons, but this may simply be due to the above-mentioned fact that they are more often sentenced to penal servitude for a first offence.

Of much greater practical importance than these administrative classifications is the fact itself that persons of vastly different means, social standing and education meet in a penal institution. Even in prison there is no classless society. The results of this mixing together of such heterogeneous elements—which has its counterpart probably only in the Army—have not yet been sufficiently investigated by sociologists. Ex-prisoners' memoirs represent almost our only source of information. For our present purposes, their principal weakness is not so much their—real or alleged—unreliability or partiality[1] as the fact that most of them are written by prisoners of a special type, and, therefore, not always representative of the great majority of their fellow prisoners. Nevertheless, they offer many highly interesting sidelights on those very problems with which we are now concerned. Attention has already been drawn to the inequality which a rigidly enforced principle of non-superiority must entail for the prison existence of persons accustomed to a higher standard of living. The food problem, however, is apparently not the worst part of their sufferings. The complaints about prison food are fairly equally distributed among all those who have "once eaten out of the tin bowl."

[1] See the complaints made by Mr. Leo Page, *Crime and the Community*, p. 12.

In this respect, there are hardly any noticeable differences in the indignation felt, for instance, by a well-to-do middle-class man like Loughborough Ball,[1] who spent a few years at Maidstone, a Macartney, or Mark Benney, and by the average prisoner. There are some other aspects of prison life where class differences make themselves more conspicuously felt. Mr. Ball[2] regards the question of whether there were any class distinctions at Maidstone as "almost unanswerable, unless the answer were to be lost in a maze of qualifications." His own narrative, however, shows unmistakable evidence of distinctions which he perhaps did not consciously interpret as such. Education seems sometimes to act as a disrupting force. "Most of the illiterate men"—writes Mr. Ball[3]—"regard all the educated men as eccentric, if not mad." And Mr. Ball in his turn pities a "well-known solicitor, with an eclectic taste in literature," who has to do his work with a man who can neither read nor write, "and each is a perpetual source of irritation to the other."[4] Or, the same writer expresses his dislike of the stage privilege of dining in common, because one may be unfortunate enough to come into contact with "primitive ways of eating that can destroy the finest appetite."[5]

Should this not remind us of the fact that the old-type political prisoner of a hundred years ago—also well-educated and hailing from middle-class families—usually became an ardent believer in the blessings of solitary confinement, because he disliked the company of his fellow prisoners? Matters changed considerably with the rising of the modern revolutionary who was

[1] See his *Trial and Error* (1936), pp. 123 et seq.
[2] op. cit., p. 152.
[3] op. cit., p. 135.
[4] op. cit., p. 157.
[5] op. cit., p. 111.

not slow to grasp the unique possibilities of spreading his political gospel amongst his fellow prisoners. Surely, the political prisoner who, serving a sentence of *custodia honesta* in a Hamburg prison after the War and asked by a well-known German penologist how he intended to spend his time—this prisoner who replied: "I am going to establish a political academy here,"[1] was certainly not a believer in solitary confinement.

In some respects it is clearly very difficult for prison authorities to maintain an equilibrium between prisoners of such widely different social standards. We may take as an instance a problem that has been repeatedly discussed in the Press: *authorship in prison.* In former centuries prisoners were not only allowed to have as many visitors as they wished and to cater for themselves as well as they could afford—there was also no regulation to prevent them from utilizing their prison term to produce literary works and from taking them out on discharge. Bunyan, the prison author *par excellence*, is said to have written nine books during his first six years of imprisonment, though only two during his second period of six.[2] And it did not matter that Cobbett had been sent to Newgate for an article published in the *Political Register*; he was, nevertheless, allowed to pour out his regular contributions to that journal[3]—to say nothing of Defoe who probably saved his life through the success of the *Hymn to the Pillory.* It is a magnificient series of illustrious names that claim

[1] See M. Liepmann in *Reform des Strafrechts* (1926), p. 137.

[2] Jack Lindsay, *John Bunyan* (1938), p. 149.

[3] *The Life and Letters of William Cobbett in England and America*, by Lewis Melville, Vol. II, p. 58; G. D. H. Cole, *Persons and Periods* (1938), p. 150.

a prison as their spiritual home. Occasional complaints, it is true, were not altogether missing even a hundred years ago, as the following reflection of Jeremy Bentham shows:[1] "Among the inconveniences which may be attached to imprisonment, there is one which is particularly inequable. Take away paper and ink from an author of profession, and you take away his means of amusement and support. . . . A privation so heavy for those whom it affects, and at the same time so trifling for the greater number of individuals, ought not to be admitted in quality of a punishment. Why should an individual who has received instruction in writing be punished more than another?"

The present regulations, which seem to prevent a prisoner from bringing out of the institution any writings completed during his sentence, have recently been attacked by Sir John Squire,[2] Mr. R. M. Fox,[3] and the *Howard Journal*.[4] In defence of the prohibition, it has been argued that, as a general rule, nobody is permitted to run his business from the prison cell, and if the professional author could write books to sell on discharge, how could corresponding liberties be refused to other prisoners?[5] In other words, this is regarded as a privilege that, if granted to members of a special profession only, might easily destroy the social equality which is supposed to reign within a penal institution.

[1] *Rationale of Punishment* (1830 edition), pp. 112–13.

[2] *The Sunday Times* of September 19, 1937.

[3] *New Statesman and Nation*, January 21, 1939, p. 81.

[4] Vol. IV, No. 4 (1937), p. 367.

[5] See the anonymous reply to Sir John Squire's letter in *The Sunday Times* of September 26, 1937.

PART III

THE LEGAL DILEMMA OF PENAL REFORM

CHAPTER VI

THE PROBLEM OF CRIMINAL PROCEDURE

HAVING dealt with the economic and social factors which may hinder the progress of Penal Reform, we have now to face certain difficulties caused by the law of criminal procedure. Of course, we have been discussing legal aspects the whole time, but hitherto mainly in so far as they affect the social status, etc., of the offender. Now, however, it remains to see how far the law, and in particular that of criminal procedure, has adapted, or is in the process of adapting, itself to the special needs of modern Criminology and Penology, or how far there exist any inconsistencies between both. These needs are obviously quite different in character from those of former times. How great the change has been can best be shown by an examination of the *three principal stages* through which a criminal case as a rule has to pass: the first stage ending with the formal finding of guilt by the jury (or the corresponding personal determination of the magistrate to regard the prisoner's guilt as proved), secondly, the imposition of the sentence (or the making of a Probation Order), and finally, its execution. During the last fifty years or so there has taken place a considerable shifting of emphasis from the first to the second and third stages—a process due not so much to reasons connected with the law of procedure itself as to the well-known recent development of Criminology and Penology. In the age of the Classical School, when retribution and deterrence were regarded as the only purposes of the

law, criminal procedure had to provide the machinery best suitable for an impartial finding of the facts of the particular crime with which the Court happened to be concerned. The person of the criminal himself had, as much as possible, to be kept in the background. In some countries he is almost the least important figure on the stage and almost the last one to open his mouth during this first part of the trial.[1] The law here hardly takes any notice of him interested as it is only in his crime, and this—it is believed—can be cleared up by other persons better than by the man or woman who is charged with it. A most elaborate and ingenious system, the law of evidence, has been established to ensure that the facts of the crime should be found out as impartially as humanly possible whilst on the other hand it is regarded as the—unwritten but none the less vital—duty of the judge and jury or of the magistrate to keep themselves distant from the prisoner in order to preserve not only their impartiality itself, but also its external appearance.

As soon, however, as the prisoner is found guilty and the second stage of the trial begins, a considerable change takes place. The strict rules of evidence no longer apply; the person of the prisoner gains somewhat in importance: his previous convictions have to be considered, and a suitable sentence has to be found for him. In an English trial by jury, there is even a change in the persons who have to perform this task: the responsibility passes from the hands of the jury into those of the judge, whilst in the Police Courts as well as in many Continental Courts no change of this kind occurs, and in France, Belgium, etc., a compromise has been found which enables judge and jury to join in the

[1] See *Justice in England*, by a Barrister, pp. 212–13.

choice and imposition of the sentence.[1] Should this sentence involve some form of loss of liberty, or, for instance, the placing of the offender under Probation, the third stage begins, and with it another category of authorities enters the scene: the offender passes into the hands of the prison administration, the Probation Officer, etc., whilst the whole procedure becomes still less formal in this final stage. It is obvious that the growing interest taken by modern Criminology and Penology in the person of the criminal and his reformation was bound to increase the significance of the stages devoted to sentence and treatment. Moreover, even with reference to the first stage it might now be asked whether the atmosphere which at present surrounds this stage does not sometimes possess such an excess of formalism and aloofness as may be detrimental to the very ends of criminal justice as they are now conceived. Let us make quite clear what is meant: Certain sections of the law of criminal procedure, whilst admirably suited for securing a fair and impartial trial, may possibly, from the psychological point of view, have somewhat outgrown their original usefulness. The fundamental idea is that a criminal trial should be conducted in the form of a combat between two supposedly equal parties. Hence the institution of cross-examination, the requirement of a formal plea of "guilty" or "not guilty" on the part of the prisoner, etc. Other essential principles, as, for instance, that of publicity, are regarded as indispensable in the interests of the liberty of the subject. Even if we accept the system of cross-examination, the rules of evidence, etc., as useful for the clearing up of the

[1] As to the details, see the author's article in *Law Quarterly Journal*, Vol. 53, pp. 99 et seq., 388 et seq., in particular p. 400.

external facts of a crime, they can hardly be regarded in the same light when it becomes necessary to examine difficult psychological situations in order to decide the question of guilt. There can, however, be no doubt that even the external facts of the case themselves can often be cleared up only by means of establishing some sort of psychological contact between the prisoner and his judge. The facts, as presented by the evidence, may be open to strongly conflicting interpretations, and then the key to them will be in the hands only of those who understand the prisoner's personality. Herein lies the strength of those legal systems which provide for the prisoner an opportunity of telling his story in full and thereby establishing some sort of human contact with the Court *before* the hearing of the evidence. For that purpose even a trial in camera, utterly repugnant as for other reasons it must be to our minds, may be more suitable than full publicity.

There is another point that needs our consideration: Even if it be true that the present strictly formal methods of criminal procedure are ideal ones for the first stage, up to the finding of guilt, whilst they have rightly been relaxed for the sentencing stage—then the problem arises whether it is psychologically possible for the Court to switch over from its previous attitude of aloofness and impersonality to an entirely new one of personal contact and interest.

Moreover, it might even be asked whether such an endeavour to establish close contact with the prisoner is altogether appropriate for a Court of Justice, or whether, on the contrary, it might be more in accordance with the classical ideas of Criminal Justice—justice with blind-folded eyes—that no such contact should exist. Lastly, is it not incompatible with the

true functions and spirit of a Judge that he should have anything to do with the *final* stage of criminal proceedings, the execution of a sentence? To show the practical significance of all these scruples, a few passages may be quoted from an article published immediately after the War by the American judge, Herbert M. Baker—not the one of Judge Baker Foundation fame: "The true function of a court," he writes, "is to determine judicially the facts at issue before it; or, in criminal matters, the guilt or innocence of persons charged with crime. Investigations of the lives, environments, or heredity of delinquents, the infliction of punishment [*sic*], and the supervision of probation, institutionalize the courts and are repugnant to every tenet of the science of law."[1] Hardly ever has the judge's dilemma been more openly unveiled.

It is easy to discover the legal, philosophical and historical foundations on which this dilemma rests: it is first of all the old principle of *Separation of Powers*, which is at the bottom of the idea that the imposition of the sentence (or the making of a Probation Order) ought to form the uttermost point where the competence of the judiciary should end and that of the administrative authorities begin. Hence, no Criminal Court ought to concern itself with the execution of its own penalties, whilst no administrative authority ought to interfere with the trial and the choice and the imposition of the sentence. Moreover, again as a consequence of the doctrine of Separation of Powers, it is believed that not only as to the *scope* of their respective activities, but also as to the whole *spirit* and *methods* of procedure

[1] *American Journal of Sociology*, Vol. 26 (1920–1), p. 177; also quoted by H. H. Lou, *Juvenile Courts in the United States* (1927), pp. 213–14.

must there be a distinction between the judiciary and the administration.

If we briefly examine how far these principles still hold good in modern criminal procedure and penal administration, it at once becomes clear that they have frequently been and are being abandoned in both directions. First, there is a certain amount of interference on the part of the administration with the work of the Criminal Courts—interference, of course, as is hardly necessary to add, not *contra* or even *praeter legem*, but on a strictly legal basis. In other words, the law itself has sometimes transferred certain tasks which are in fact of a truly judicial character from the Courts to the administrative authorities. To give a few examples of this kind: As a consequence of the too narrow formulation of the McNaughten rules—which deal with crimes due to insanity—the Criminal Courts may sometimes have to impose the death penalty on a prisoner who committed murder in a state of insanity. According to the Criminal Lunatics Act, 1884, however, this can be made good by the Home Secretary who, under certain circumstances, is competent to transfer such prisoner to an asylum, which means that he has to do the work which in fact ought to be done by the Courts. There is another case of still greater practical importance where it may, however, be somewhat doubtful whether, according to general principles, the Courts or the administrative authorities ought to be competent: discharge on licence from prison, Borstal or Preventive Detention. In this country all those measures come within the competence of the Home Secretary; in the United States special administrative agencies, the Boards of Parole, have been established, while under Continental law it is usually—one except-

tion is Hungary—the judge who has to make most decisions connected with remission of a part of the sentence. In Germany, where the Prevention of Crime Act of 1933 has entrusted the Courts with all decisions of this kind, there is at present a certain amount of discussion going on as to the expediency of this course, and the supporters of the present law take great care to emphasize that the competence of the Courts is preferable not because of their greater independence—a point that would be as doubtful as unpopular—but for other reasons.[1] There is, in principle, something to be said for both views: for the Continental one it can be claimed that any kind of remission before completion of the full sentence means a substantial interference with the decisions of the Court, whilst the English view is based upon the fact that the administrative authorities are in a better position to know in each individual case when discharge on licence might properly be granted.

It is difficult to say whether the Criminal Justice Bill, taken as a whole, can be regarded as tending towards a further strengthening of the powers of administrative authorities at the expense of the Courts. Whilst the present state of affairs as regards remission of a portion of prison sentences or release on licence in case of other sentences will be continued in principle (clauses 52 and 53), it is obvious that the proposed abolition of the Division System—the social implications of which have already been discussed[2]—has to be interpreted as destroying the last opportunity reserved to the Criminal Courts for expressing their views as to how a prison

[1] See, e.g., *Monatsschrift für Kriminalbiologie und Strafrechtsreform*, Vol. 29 (1938), pp. 28 and 329 et seq.

[2] See above, p. 125.

sentence ought to be carried out. (In Massachusetts—we are told[1]—the Criminal Courts have even the right to specify the particular prison or reformatory to which they want an individual prisoner to be committed.) Moreover, while at present the Secretary of State has only the right to transfer, under certain conditions, a person serving a Borstal sentence to prison (Prevention of Crime Act, 1908, sect. 7), the Bill proposes to give him also the power to transfer persons under twenty-three years of age from prison to a Borstal institution, if he be satisfied that it will be to the advantage of the prisoner to be so detained (clause 57). In other words, though he may not extend the length of the sentence imposed by the Court, the Secretary of State will have power completely to change its character by substituting a Borstal for a prison sentence.[2]

On the other hand, the Bill also contains a provision which shows a tendency to strengthen the part played by the Criminal Courts in the stage of execution—not, it is true, as far as a prison or Borstal sentence is involved, but in connection with the carrying out of a Probation Order. In this connection the complaint has sometimes been made that the Courts, and even Juvenile Courts, after making a Probation Order, frequently do not sufficiently interest themselves in the way in which it is carried out.[3] The same applies, by

[1] See Sam Bass Warner and Henry B. Cabot, *Judges and Law Reform* (Harvard University Press, 1936), p. 158.

[2] This power has now, with respect to young prisoners, also been given to German administrative authorities, under a decree of January 22, 1937 (see *Monatsschrift für Kriminalbiologie und Strafrechtsreform*, Vol. 29, p. 34).

[3] See in particular Miss W. A. Elkin, *English Juvenile Courts* (1938), pp. 201 et seq.

the way, to committals to Home Office Schools.[1] The Bill (clauses 1 and 2) proposes to make the Justices more alive to their obligations in this respect by establishing special "case committees" whose duty it shall be "to review the work of probation officers in individual cases, and to perform such other duties in connection with the work of probation officers as may be prescribed." At present, it is already the duty of the Probation Committee "to discuss from time to time with the probation officer the progress of each of the cases under his supervision and afford him such help and advice as it can in carrying out his duties."[2] But, as the *Report on the Social Services in Courts of Summary Jurisdiction* states,[3] in many places this has remained a dead letter, and it is now hoped to improve the position if this individual case work will be entrusted to special case committees.[4] Although this provision is excellent, to many ardent penal reformers who interest themselves mainly in Juvenile Court work it may still not go far enough. In an admirable book on the latter subject, published some time ago,[5] the author complains that one rarely gains the impression that a Juvenile Court "is really actively concerned with the whole question of juvenile delinquency in the town, in all its bearings." Will it, however, be generally accepted as the business of a Juvenile Court to concern itself not only with the individual cases that are brought before it, but with the whole question of juvenile delinquency "in all its bearings"? We have thus arrived at the point from which the existing inconsistencies

[1] Miss Elkin, op. cit., pp. 209–10.
[2] Probation Rules, No. 17.
[3] *Report* of 1936, p. 95.
[4] *Criminal Justice Bill, Explanatory*, p. 11.
[5] Miss W. A. Elkin, *English Juvenile Courts*, p. 73.

between the requirements of modern penological thought and the traditional conservatism of the law of criminal procedure can best be viewed. Indeed, the case of the Juvenile Court represents an ideal opportunity for demonstrating the incompatibility between some fundamental principles of legal doctrine and the particular needs of at least certain categories of offenders. In saying this, the author wishes to emphasize that the following remarks on the dilemma facing the Juvenile Courts ought to be interpreted with a pinch of salt, as he is well aware of the fact that—owing to the common sense, tact and human understanding of the persons responsible—there will be found in many cases some sort of compromise solution. Sometimes, however, it seems advisable to look at the matter through a microscope, to enlarge the dimensions all round, in order to become fully aware of certain dangers that may otherwise overtake the work of the Juvenile Court. The chief difficulty of this institution lies in the fact that it is both a Criminal Court and a Children's Court, for a Children's Criminal Court is a contradiction in terms. To anticipate one of the many objections that will be raised against this statement: It has sometimes been stressed that the Juvenile Court, having both civil and criminal functions and dealing not only with delinquent children, but also with care and protection cases, etc., is not exactly a Criminal Court,[1] and it is, in fact, true to say that it is both, a Civil and Criminal Court in one.[2] Therefore, as is

[1] This line was already taken in the *Report on the Treatment of Young Offenders*, 1927, p. 20.

[2] The Home Office *Circular* of August 9, 1933, states that "the juvenile court is not solely or primarily a criminal court. It is equally a civil court."

usually the case with social institutions of a mixed nature, it receives its predominant character and reputation from that part of its activities which is most in the public eye and this, for reasons of greater frequency and sensationalism, is the criminal part.[1] What are the chief conclusions to be drawn from this fact that the English Juvenile Courts are pre-eminently Criminal Courts? First, there is the inevitable consequence that, in the case of children charged before it with an offence, the Court has to establish the facts of that offence. This, it is true, is not generally acknowledged; in some American states as well as in the New Zealand Child Welfare Act of 1925, it is held that the Juvenile Court is not bound to determine whether the child has in fact committed the offence with which it is charged.[2] This offence is rather regarded as a mere symptom and can, therefore, be replaced by another symptom, which may make it equally necessary for the Court to take certain steps in the interest of the child. English law, however, has never adopted this view; the *Report on the Treatment of Young Offenders*, 1927, expressly repudiated it, and quite rightly so. As long as the Juvenile Court remains a Criminal Court, and as long as the commission of an offence leads to social stigmatization—even in the case of children, and perhaps for life—it is unthinkable that the Court should have power to evade the question, which is vital for such Court, whether or not the accused person is really guilty of an offence. It is true that under the Children and Young Persons Act, 1933, there is the

[1] Miss Elkin, op. cit., p. 36, is right in stressing this point.

[2] See, e.g., Herbert H. Lou, *Juvenile Courts in the United States* (1927), pp. 36–7; *Report on the Treatment of Young Offenders* (1927), p. 19.

other possibility of dealing with a child or young person as a "care or protection" or a "beyond control" case, but in law this is a category to be distinguished sharply from the young delinquent, though everybody knows how difficult it often is to keep the groups apart in actual practice. Having thus burdened the Juvenile Courts with the task of investigating criminal charges, the legislator had to invent a procedure which would adapt what is regarded as essential guarantees of a thorough and impartial trial to the special needs and the mental capacity of a child or young person. How far can this be done—and is it indeed possible to have it both ways? Let us consider this problem—not the whole Juvenile Court procedure, but at least a few aspects of it—in some detail.

There is first the well-known retention of the right to choose a trial by jury for certain offences, which makes it necessary to put an explicit question to this effect to the young person. As under German law a similar choice was possible in the Adult Court, the author can testify from his own judicial experience that the meaning of such questions was hardly ever grasped even by adults. Why then retain it for young persons to whom, when in Court on a criminal charge, almost any kind of question is puzzling and embarrassing?[1]

Secondly, the child or young person is asked whether he or she pleads guilty to the charge. Indispensable as it is for the Court to know the attitude taken by the person charged, it cannot be regarded as a suitable method of dealing with children to make such an enquiry in formal words. The term "guilty" frequently

[1] See Miss Elkin, op. cit., p. 60. Already the *Report on the Treatment of Young Offenders* (1927), pp. 30 et seq., recommends the abolition of the right of trial by jury, but only for children.

implies a considerable number of difficult problems, legal and otherwise. A child ought not to be forced to commit himself in this way, and certainly not immediately after he has entered the Court room.[1] It is much better to use the method, which is sometimes actually adopted, to tell the child at once the main contents of the charge and to ask him whether he wants to give his version. The Court should never regard a formal plea of guilty on the part of the child—which may be based upon a complete misunderstanding of the meaning of the charge—as a sufficient substitute for the child's own story, making the hearing of any further evidence unnecessary. In one actual case a boy of 16 was charged with indecent assault on a girl of 7 years. He made an extremely dull impression—his weekly earnings were given as 6d., and he had attended a Special School. The usual question was put to him, and he pleaded guilty; his parents, however, objected, and made an attempt to tell the story, whereupon the boy was asked whether he understood the meaning of the charge and really wanted to plead guilty. His answer was again in the affirmative. Surely, the only way of dealing with a case of this type would be to encourage the boy to tell his story, whilst a formal plea of guilty, confirmed with an assurance of his understanding, is of little value.

The *Report on the Treatment of Young Offenders*, though sympathizing with this latter view, felt unable to make a recommendation to that effect, because, it was stated, it might be necessary, in more difficult cases, "to hear a certain amount of evidence before being in a position to define the exact nature of the offence."[2]

[1] See also Miriam van Waters, *Youth in Conflict* (1926), p. 123.

[2] *Report*, pp. 31–2.

If this be true it would only show that there are at present cases brought before the Juvenile Court without the necessary preliminary selection and preparation, which may, in its turn, be due to the fact that English criminal procedure still lacks that important link between the police and the Court, the *public prosecutor*.

Such an institution, familiar to everyone who knows Continental or Scotch criminal procedure, will certainly bring with it some of the apprehended disadvantages of a centralized system of prosecution. On the other hand, it represents a suitable machinery not only for making more uniform the methods of Court proceedings and the application of the criminal law, but also for improving, in other respects, their whole technique. Miss Elkin[1] makes the interesting suggestion of appointing for that purpose "inspectors" or "official visitors," who might "without contravening the principle of the independence of the administration of justice . . . play an important part in helping to level up the standards of the courts by informal discussion and advice." Apart from other possible objections, it may be doubtful, however, whether such an occasional visitor, with his necessarily inadequate knowledge of the individual cases and of the human material that has to deal with them, would be able to exercise sufficient authority to overcome deep-rooted local habits.

So much has already been written on the suitability of the method of question and answer and, in particular, of the highly technical art of cross-examination, for the hearing of witnesses in the trial of children, that there is hardly anything more to be said.[2]

[1] op. cit., p. 302.

[2] See, e.g., Mr. Albert Lieck, *Bow Street World* (1938), p. 52.

There are still two other points which seem particularly suitable for demonstrating the grave dangers which may arise from an inadequate adaptation of the criminal procedure to the needs of a Juvenile Court.

First, the taking of the *oath*: It can hardly be denied that children are much too frequently asked to give evidence on oath. The modern science of criminal procedure has, even in the case of adults, become more and more sceptical of the value of an oath as an instrument for securing reliable evidence.[1] In former years certain countries, in particular Germany, suffered from an intolerable excess of this form of solemn confirmation of a deposition. The result was a veritable epidemic of perjury in Germany with a corresponding annual average of more than 2,000 convictions for this crime, which finally led to an attempt to stamp out this evil, at least partly, by decreasing the opportunities for taking the oath.[2] The special problems of the child and young person are dealt with in various ways in the different countries. Usually the law fixes an absolute minimum age limit below which no person can take an oath in Court, this limit being, for instance, in Germany, 16; in France, 15; in Poland, 14 years;[3] whilst persons above this limit may remain unsworn if, on account of defective development of intelligence,

[1] See again Mr. Lieck, op. cit., pp. 35, 244–5.

[2] The Statute of November 24, 1933, is entirely based upon a Draft actually published in 1929. One of its most interesting provisions is that the Court may not administer an oath if it holds the opinion that the witness lies or that his evidence is of no importance. In the case of petty offences (transgressions) a witness shall take the oath only if the Court regards it as indispensable.

[3] German Code of Criminal Procedure, § 60; French Code d'instruction criminelle, art. 79; Polish Code of Criminal Procedure, art. 110.

they have an insufficient understanding of the significance of the oath. In English law the position is rather different in so far as there is no definite minimum age limit; there is only the provision of section 38 of the Children and Young Persons Act of 1933, that the evidence of a child of tender years who "does not in the opinion of the Court understand the nature of an oath" may be received, even though it had not been given upon oath. Consequently, a Court may administer an oath even to a very young child, and there is a definite danger that lay justices may use this weapon—which, as every expert knows, is a two-edged one—in unsuitable cases. If the oath is administered automatically to children and young persons in proceedings for petty offences or in confirmation of utterly insignificant depositions, this must necessarily result in a general depreciation of its value. It is particularly inappropriate to ask the accused child whether he wishes to give evidence on oath, since a child, thus addressed, can hardly possess enough moral power of resistance to say "no."

Miss W. A. Elkin[1] reports a case where the accused boy denied his guilt on oath and the bench had therefore to discharge him, though very doubtful as to his innocence. Later it became known that he had already made a confession at the Child Guidance Clinic. Miss Elkin regards this case as evidence for her view that no child charged with an offence should be sent to a clinic for psychological examination *before* trial.[2] The present writer would rather be inclined to use this example as an excellent illustration of the dangers of an oath, when administered to children. The whole

[1] *English Juvenile Courts*, p. 106.

[2] This point will be discussed later, see below, p. 209.

problem as to when the evidence of children should be accepted unsworn does not, however, represent a real inconsistency between the requirements of a well-regulated law of criminal procedure and the special psychological situation of the young offender. On the contrary, both go hand in hand here as soon as it is fully understood that the automatic administration of an oath to children and young persons is in the interests neither of truth nor of the offender.

There is, however, another point that is obviously bound to lead to difficulties: According to the general rules of criminal procedure a criminal trial has to be conducted in the presence of the accused, and any report or other document which shall be used as evidence against him must be read to him so that he may be able to defend himself against any incriminating statements. Whilst this is without doubt a principle of fundamental importance for the discovery of the truth, the dangers it may entail in individual cases are hardly less obvious. One can easily imagine the harm that may be done, for instance, to a person of unstable mentality when he has to listen to a detailed psychiatric account of the state of his mind, etc., and it is mainly for this reason that some legal systems have, though reluctantly, admitted certain exceptions from the general rule. The more that modern criminal procedure, at least in the sentencing stage, becomes concerned with the task of searching the most intimate corners in the prisoner's life history and mentality, the more difficult must it often be to do justice both to the fundamental rule of a legal combat that it should be fought in the open and to the psychological or even simply humanitarian requirement of hiding certain brutal facts from the offender. Nor is this all: It is sometimes not only the

sensitiveness of the accused that is in need of gentle handling—one must also most carefully safeguard the whole of his relationship with, and his confidence in, those on whose efforts he has to rely for his further treatment. Under the classical ideas of crime and its treatment the typical expert witness expressed his opinion on the case and never, as a rule, had any further contact with it or the prisoner. Now, the chief burden of making enquiries into the family and home conditions, the habits and future prospects of an offender lies in the hands of the social worker who may be called upon by the subsequent Order of the Court to act as his friend and adviser in closest collaboration with his family over a long period. It is true, in those cases where the resulting conflict might become intolerable a solution will usually be provided by sending the child or young person away to a Home Office School or Borstal. But there are undoubtedly cases where in spite of a not too favourable report from the Probation Officer the Court regards it as the most suitable course to place the young offender under the care of that official. Moreover, the Criminal Justice Bill (clauses 18 and 19) increases the possibilities of combining Probation with conditions of residence, in particular in connection with mental treatment during the Probation period. As a consequence, the problem arises of how to retain the possibility of a friendly collaboration between the Probation Officer, on the one hand, and the probationer and his family, on the other, without infringing too much on the fundamental right of the accused to know in every detail the evidence against him.[1]

[1] Briggs, *Reformatory Reform* (1924), p. 110, probably voices the opinion of the man in the street, when he writes: "The parents

The Summary Jurisdiction (Children and Young Persons) Rules, 1933, sect. 11, have made a courageous attempt to tackle this problem by providing that, after a child or young person has been found guilty, "any written report of a Probation Officer, local authority, or registered medical practitioner may be received and considered by the Court without being read aloud. Provided that (*a*) the child or young person shall be told the substance of any part of the report bearing on his character or conduct which the Court considers to be material to the manner in which he should be dealt with." And a corresponding provision is made with regard to the parent or guardian. Moreover, if the Court considers it "necessary in the interests of the child or young person, it may require the parent or guardian or the child or young person, as the case may be, to withdraw from the Court." Surely, these provisions will make it possible occasionally to soften an overharsh expression, or to withhold some details of the report which are not indispensable for the understanding of the case. Further than that, however, the Court cannot go, if it really wants to comply with the spirit of the rules, which provide that "the substance" of any such report must be repeated to the young offender, his parents, etc. If the parents, for instance, are to be placed in a position to refute statements reflecting upon their character and behaviour, it becomes necessary to supply them in all detail with the facts alleged in the report. Nevertheless, if the fullest use were made of the existing possibilities, a

regard these secret papers with the greatest disfavour, and if the boy be 'sent away' conclude that someone has done them a bad turn making a malicious and untrue statement in one of these secret reports. Such reports should be read aloud by the officer."

great deal of harm could be avoided. To illustrate this point, reference may be made to a case where in the presence of the child charged it was stated that his mother cohabited with a stranger. Of course, the child had probably been aware of this fact already long before the trial; nevertheless, to state it openly in Court before twenty or more persons may have caused a lasting shock to a child not blessed with a particularly thick skin. It is obvious that there must be the fullest opportunity for discussing points which are of so fundamental importance for the decision of the Court, but why should this be necessary in the presence of the child, when the rules allow of his temporary removal? The explanation seems to lie in the fact that the old ideas of what constitute the essential elements of a fair trial die very slowly—and perhaps particularly so when handled by non-jurists. The professional lawyer—if he really understands his job—may be more inclined to abstain from too rigid an application of those time-honoured legal principles, since he knows that they are of only relative validity—whilst the layman, with his necessarily more limited experience of the working of these rules, may regard them as sacrosanct.

This apparently paradoxical contrast between jurist and layman does not, however, reveal the whole truth. The root of the problem may be still deeper. How far is it at all possible to imbue Court proceedings with the principles of psychology? Is it not one of the most common characteristics of such proceedings to be unpsychological? It seems, for instance, indispensable for the proper understanding and handling of a juvenile delinquent to establish close personal contact with him—an aim that can, however, be achieved, if at all, only in the course of a long private talk, with judge and

offender face to face. The atmosphere of Juvenile Court proceedings—however informal it may be when compared with an ordinary trial—will never be an adequate substitute for such an ideal. Anyone who has ever had to face a phalanx of several persons, however benevolent—whether a board of examiners, an appointment board, etc.—knows how impossible it is to establish real contact with them, and the greater their numbers, the more haphazard and superficial become their methods and the higher the chances that they may arrive at a wrong decision.

Professor Grace Abbot[1] publishes the *Observations of an American Probation Officer* who visited Sir William Clarke Hall's Juvenile Court in 1932. Having duly acknowledged his sympathetic approach and the friendly relationship between the magistrate and the child, he (or she) remarks that the former never took a child out of the court-room to discuss his problems with him in private. It does not appear to have occurred to this observer that such a procedure, however desirable it might be, is entirely out of place in a Criminal Court.

There is nothing new in this statement. The greatest and most enthusiastic protagonist of the Juvenile Court idea in this country, Sir William Clarke Hall, himself writes:[2] "The real truth is . . . that no simplification of procedure, no regulations for the 'trial' of children, however perfect in themselves, reach down to the root of the matter, as long as we continue to conceive of the child as a 'criminal' and merely to admit such modifications of his criminality as are due to youth, so long shall we fail to provide the most fitting cure for his

[1] *The Child and the State* (1938), Vol. II, p. 485.
[2] *Children's Courts* (1926), p. 64 (George Allen & Unwin).

misdeeds." One could perhaps express the gist of the whole problem as follows: The treatment of juvenile delinquency in Court has now reached a stage where the young offender is dealt with very kindly and with the greatest consideration. What is still missing is to treat him not—as at present—as an *adult in miniature*, but as a child—in other words, to admit that the difference between a child and an adult is deeper than merely one of growth.

What are the possible remedies?

The most obvious and perhaps also the simplest of all would be a radical change in the Juvenile Court *age limits*. The present range of 8 to 17 years seems to begin and to end too early. Children of elementary school age should never be dealt with by a Court which imposes penalties and is, therefore, in substance, a Criminal Court.[1] On the Continent, the usual age limits are from 13 or 14 to about 18 years.[2] Surely, this means much more than a mere difference in the numbers of children brought before the Juvenile Court, although even this in itself is considerable enough: According to the *Criminal Statistics* for the year 1936,[3] *persons under 14 years* found guilty of *indictable* offences only numbered no less than 14,459 in that year, as compared with 12,667 persons of 14 and under 17

[1] It is interesting to note that the Children, Young Persons, etc., Bill of 1924, art. 114, proposed to raise the age limit to at least ten years.

[2] See the details in Miss J. Irene Wall's contribution to the League of Nations' (Advisory Committee on Social Questions) publication: *Principles Applicable to the Functioning of Juvenile Courts and Similar Bodies, Auxiliary Services and Institutions* (Geneva, 1937), pp. 37 *et seq.*

[3] Table X (A): Courts of Summary Jurisdiction (including Juvenile Courts).

years. Surely, the whole statistical picture of juvenile delinquency in this country would be greatly altered if the age groups under 14 should be excluded from the work of the Juvenile Courts.

The difference between the English and Continental legislation is, however, still more far-reaching than the mere contrasting of age groups suggests, the reason being that in many countries even young persons between 14 and 18 are not unconditionally responsible for their offences. Under the German Juvenile Court Act of 1923, for instance, where children under 14 are entirely exempted from any criminal responsibility, young persons between 14 and 18 are not punishable if, at the time of the offence, they were unable—owing to their intellectual or moral development—to understand the unlawfulness of their behaviour or to act in accordance with such understanding. In this country, the legal position is, in brief, as follows: Whilst children under 8 are entirely exempt, there exists for children between 8 and 14 "a presumption that they are not possessed of the degree of knowledge essential to criminality, though this presumption may be rebutted by proof to the contrary."[1] In actual practice, however, the necessity of proving that the young person really knew that he had done wrong, does not always seem to be taken very seriously—quite apart from the fact that here, just as in the case of insanity, it is only the element of knowledge, not the power of moral resistance, that matters.

The reasons for this attitude of English law are

[1] Sir James F. Stephen, *A History of the Criminal Law of England*, Vol. II (1883), p. 97; Atherley Jones and Hugh H. L. Bellot, *The Law of Children and Young Persons* (1909), pp. 209–10. The Acts of 1932 and 1933 have made no change in this respect.

apparently twofold: The first one would seem to be connected with the *social* conditions in which children grew up, with the particularly great extent of child labour, etc., which may have led to the belief that even children of a very tender age must well be capable of understanding the legal implications of their actions. Henry Mayhew, in his *London Labour and the London Poor*,[1] relates a talk he once had with a girl of eight years: "I did not know how to talk with her. At first I treated her as a child, speaking on childish subjects; . . . I asked her about her toys and her games, but the look of amazement that met me soon put an end to any attempt at fun on my part . . . all her knowledge seemed to begin and end with water-cresses and what they fetched. Talking of Farringdon Market, she said, 'We children never played down there, 'cos we're thinking of our living.' " Now that social conditions have widely changed, there would seem to be still less justification for treating children as little adults with regard to criminal responsibility. And even in general, quite apart from such social changes as affected only the poorest classes, "one can be pretty certain," as Professor J. J. Findlay writes,[2] "that boys and girls did ripen more quickly in the old days. In one of our great Continental wars a Prince of Wales performed great deeds as a commander at the age of 16 (Battle of Crécy, 1346). In our last wars in those parts the King would certainly not have entrusted a son of that age with any responsibility. One clear fact is that the young matured more quickly because there was less to learn." Others may perhaps be inclined to

[1] Henry Mayhew, *London Labour and the London Poor* (1861), Vol. I, p. 151.

[2] *The Children of England* (1923), p. 228.

draw the opposite conclusion that present-day children who grow up under the modern complex conditions of life will sharpen their wits with a rapidity unheard of in the good old days—but it is an artificial maturing of the intellect only, not accompanied by a corresponding strengthening of the character.

The second reason for keeping the minimum age limit of criminal responsibility so low is undoubtedly of a piece with the desire to protect the liberty of the citizen against too much interference on the part of administrative authorities. If delinquent children can no longer be brought before a Juvenile Court it is clear that something else must be done with them, and that they will, therefore, have to be dealt with by some other agency.[1] This, it is sometimes suggested, might be the school. Such a solution can hardly be favoured, first, because it would be distinctly against the interests of the school itself to burden it with new tasks of an at least semi-punitive character, and, secondly, because one can scarcely expect the average school-teacher, well-meaning and keen as he may be, to possess the necessary qualifications for the hearing and sifting of the evidence in delinquency cases. The only tangible result of such a change would be to make the school unpopular. The second possibility might be to establish a special agency of a purely administrative character; this does not appear to be practical policy because public opinion would probably not consent to entrust an administrative body with measures of so far-reaching a character. When some years ago the proposal was made to transfer the "care and protection"

[1] As to the following text, see, e.g., Herbert H. Lou, *Juvenile Courts in the United States* (1927), pp. 212 et seq. See also Miss W. A. Elkin, op. cit., p. 48.

cases to the local authorities in a manner similar to that provided in the Poor Law Act, 1930, sect. 52, for destitute children, this does not seem to have met with much approval.[1] For similar reasons, in the German Act for the Welfare of Juveniles (*Jugendwohlfahrtsgesetz*) of 1923, the more serious measures against minors in need of care and protection, such as supervision orders (*Schutzaufsicht*) and committals to Approved Schools (*Fürsorge-Erziehung*) are left to the Court—not, however, to the Juvenile Court, which deals exclusively with delinquent cases, but to a Court of Chancery.[2]

Under such circumstances, the simplest way out of the existing difficulties would seem to be the following:

(1) There ought to be no *criminal responsibility* whatsoever in the case of children under 14 years, nor should they be brought before a Juvenile Court as "care and protection" or "beyond control" cases.

The interesting problem as to when criminal responsibility should begin from the point of view of child psychology lies somewhat outside the scope of our present discussions. For the legislator, however, this is a problem which should receive careful attention. If Professor Jean Piaget[3] states, for instance, that "formal thought does not appear till the age of 11–12," and that "at the age when children can say that foreigners are people from another country (about 9–10) they are still ignorant of the fact that they are themselves foreigners for these people,"[4] or when an enquiry amongst girls of 11–14 years showed that 28 out of 69

[1] See *Justice of the Peace*, 1935, p. 723.

[2] See §§ 56, 57, 60, 62, 63 of the Act.

[3] Jean Piaget, *Judgment and Reasoning in the Child* (translated by Marjorie Warden, London, 1928), pp. 251, 107, etc.

[4] op. cit., p. 131.

thought it lawful to keep things they had found[1]—surely, such and many other facts ought to be taken into account when fixing the minimum age limit of criminal responsibility. Nor would it be advisable to base the decision mainly upon the intellectual growth of the child, the element of "knowledge"—at least as important is the emotional side. A child may have well grasped the idea of property intellectually, or he may well understand that animals are sensitive to pain—as long as he has not himself experienced the loss of some part of his own property or as he has not learned to sympathize with the sufferings of other living creatures, he is not really "responsible," nor can punishment alone give him this feeling. In other words, education outside a Criminal Court must first be given a more extended period for making its influence felt, before the heavy machinery of the penal law can be allowed to fall upon the child.

The fourteen years line is obviously not sacrosanct, all the more as national and biological differences, the climate and the social development of the country concerned play a great part. As a change from eight to fourteen might be too drastic to be made at once, the twelfth or thirteenth year may at first be taken as a temporary minimum age limit.

(2) As a substitute, a *Chancery Court* might be established for such cases,[2] a Court not handicapped by the necessity of observing the rules of criminal procedure. It will be objected that even a Court of Chancery

[1] Eduard Spranger, *Psychologie des Jugendalters*, third edition, 1925, p. 195.

[2] Sir William Clarke Hall, *Children's Courts*, p. 64, was not yet quite convinced that a Chancery Jurisdiction would be the best alternative, but he did not state his reasons.

would have to examine the actual facts of the charges brought against the child or the parents, in order to decide on the most appropriate measures and to justify the steps taken. True as this is, there will always be the fundamental difference that in a Court of Chancery even a criminal charge can be treated on the same footing as any other symptom of neglect or moral danger, exposing the child to no greater stigma than any other kind of negligent treatment, etc. The child would no longer be charged with an offence, because he would have committed none; he would have to plead nothing, and there would be no right to trial by jury. There would, of course, be witnesses and expert witnesses, social and medical reports, and occasionally perhaps even oaths, but the whole procedure would be not only de-stigmatized but also de-dramatized and still more simplified.

There would still be Probation Orders and committals to institutions, but it might be good to invent some other names for both, so as to separate them from the corresponding measures taken in the case of older children. Files would be kept as fully as possible; in no circumstances, however, would there be any criminal records, and the result of the proceedings before the Court of Chancery would never be entered in the "list of previous convictions", although they might be placed at the disposal of any Court or other agency that might later have any dealings with the individual concerned.

Miss Elkin [1] prefers to begin the reform from the other end: "if in this country," she writes, "we ceased to regard a child offender as a lawbreaker, the problem of the lower age limit for the jurisdiction of the Courts

[1] op. cit., p. 51.

would cease to exist." In other words, she wants first to change the attitude of the public towards the Juvenile Courts; then, she hopes, would these de-stigmatized Courts be suitable even for small children. It may, however, be doubted whether that pre-supposition can ever become a reality without appropriate changes in the legislation.

In the United States there seems to be a marked tendency to keep the child away from every contact with Juvenile Courts as long as possible. This has been very strongly brought out in Sheldon and Eleanor Glueck's symposium *Preventing Crime*, where it is even included among the governing principles of crime preventive work.[1] This may even go so far as officially to prevent the Juvenile Court from dealing with delinquent children unless they are referred to the Court by one of the crime preventing agencies. In England, the system of cautioning juvenile delinquents by the Chief Constable instead of charging them before the Juvenile Court is sometimes used. The simple procedure of cautioning can, however, not always be expected to have positive and lasting effects.

(3) If in this way the Juvenile Court were freed from those elements for which it is particularly ill-suited, i.e. the lowest age groups, it might be appropriate to ask whether its competence might not be suitably extended beyond the present upper limit of 17 years. This idea had already been propagated in this country before the passing of the Children's Act of 1908 by one of the greatest experts on the treatment of children and juvenile delinquency. It was Charles E. B. Russell—not a crank, but a man of wide practical experience who became famous as the successful manager of the

[1] *Preventing Crime* (1936), pp. 6, 117, 252.

Manchester boys' clubs and later as Chief Inspector of Reformatory Schools—who wrote with reference to the then proposed establishment of Juvenile Courts:[1] "If the age of *full* criminal responsibility could be raised in Great Britain to that obtaining in certain other countries, namely eighteen, the sphere of benefit conferred by the establishment of Courts of this kind would be enormously widened. Still better would it be could an arrangement be made that on certain allotted days *all first offenders up to twenty-one should be dealt with privately by magistrates specially interested in juvenile adults*. Even the terrible hooligan is often but a child at heart. . . All of them are *boys*, not men; and as boys the right place for most of them is neither the police court nor the prison."

The Criminal Justice Bill (clause 27) makes the greatest efforts to save young persons under 21 years from prison; if this is successful, the next step may well be to save them from the adult Criminal Court, the atmosphere and full publicity of which is usually not a healthy place for a frank discussion of young people's affairs. This becomes particularly clear in the case of boys and girls committed to Borstal Institutions. There is a strange discrepancy between the considerate treatment afforded to persons of these critical age groups in Borstal Institutions, etc., and the entire lack of discrimination exercised by the law of criminal procedure. It is the curse of the vogue for Classification that it is never satisfied. Once the law has begun to distinguish between offenders according to ages, the penal reformer will not easily be induced to call a halt. Here and there the law yields as, for instance, by

[1] Charles E. B. Russell and L. M. Rigby, *The Making of the Criminal* (1906), p. 173.

extending the Juvenile Court age from 16 to 17, or the Borstal age from 21 to 23. Mr. Leo Page has recently uttered a warning against the over-estimation of all legal classifications according to age,[1] because they are unable to take sufficiently into account individual differences. On the other hand, William R. George heads a chapter of his recent book [2] "Who said Twenty-one?", meaning that the present age limit for full citizenship is too high. In short, the validity of all legal distinctions of this kind seems to have become open to attacks.

Nobody would recommend, of course, an unmodified extension of the provisions of the Children and Young Persons Act of 1933 to persons between 17 and 21. It would be utterly unreasonable to treat alike the age groups 14 and 21. Not all of those young hooligans are "children at heart"; some of them may already be fairly hardened. Nevertheless, there must exist a machinery that may make it possible to discriminate between the various types at an early stage of their contacts with the Criminal Courts. It might not indeed be advisable to have for the 17 to 21 group separate Courts whose names would accentuate their essential difference from the Adult Courts. The setting up of a special division of the latter would probably serve much better the purpose. All that is required is to establish for those young persons a transitional stage in criminal proceedings similar to that already provided in penal treatment itself.

What then might be the principal suggestions for such a transitional stage? One of the best-known experiments of this kind, Chicago's Boys' Court, has

[1] *Crime and the Community*, pp. 242, 260 et seq.
[2] *The Adult Minor* (1937), Chapter VI.

full jurisdiction over misdemeanours and quasi-criminal offences and conducts preliminary investigations in felony cases for boys of 17 to 20 years.[1] This Court, though forming part of the ordinary Criminal Court, has the following characteristics: Segregation of the cases of boys from others in order to avoid contact between both groups; some degree of specialization of judicial functions; and, finally, "the beginnings of social services" in the Boys' Court. Whilst the last-mentioned factor is already an essential part of English criminal procedure even in adult cases, the first two have not yet been accepted. Above all, the proceedings should be conducted *in camera*, except in case of serious crimes. It does not seem to be necessary in the public interest to have full publicity for every act of petty stealing or embezzlement committed by a boy of 18. The possible deterrent effect of such public proceedings will, on the whole, be greatly outweighed by the injury done to the future life of the adolescent.[2]

The Juvenile Court is by no means the only part of criminal procedure where difficult problems of this kind require a solution—it is simply the field where new experiments can first be made and new ideas tentatively be tried out in the hope that at least some of them may prove suitable for general application. There can hardly be any doubt that many of those changes in criminal procedure which have become necessary in

[1] See Grace Abbott, *The Child and the State* (1938), Vol. II, pp. 424 et seq.; Jeanette G. Brill and E. George Payne, *The Adolescent Court and Crime Prevention* (New York, 1938).

[2] The special problems of this age group are discussed in *Actes du Congrès Pénal et Pénitentiaire International de Prague*, 1930, Vol. V, pp. 197 et seq. See, moreover, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 48, p. 588; Vol. 56, pp. 495 et seq.; Vol. 58, pp. 741–2.

the Juvenile Courts, will at some later date find acceptance in the ordinary work of the Criminal Courts. One of the most crucial problems of this kind will be the future position and functions of the *professional judge and magistrate*. Surely, for the lawyer trained in Criminal Court work it must be one of the strangest and most embarrassing aspects of the present procedure that in this country he finds himself more and more excluded from any participation in dealing with juvenile delinquency. If, as mentioned before, the Juvenile Court—of course, not the Children's Court which ought not to be a Criminal Court at all, but the real Juvenile Court for the age groups 14 to 18 or so—if such a Court is generally regarded as the place where pioneer methods can be tried out with the view to possible adoption in the adult Criminal Courts, obviously this most important work should be in the hands of first-rate jurists endowed with the indispensable amount of psychological and sociological knowledge, sitting with assessors chosen from the ranks of psychiatrists, social workers, and similar groups.

If we now pass to the functions of the Professional judge or magistrate in the *adult* Criminal Court, we find there—quite apart from the overwhelming numerical prevalence of lay justices in the Courts of Summary Jurisdiction—another movement on foot, which threatens the position of the judiciary even in the higher Courts. This is a reference to the proposition made in particular in America, and also, though with less emphasis, in this country,[1] to establish so-called *Treatment Tribunals*—perhaps exclusively composed of

[1] See, e.g., Mr. R. C. K. Ensor in his very valuable book *Courts and Judges in France, Germany, and England* (1933), pp. 89–90.

psychiatrists, psychologists and social workers—which would be competent to deal with the offender, after he had been found guilty, up to the very last stage of his penal treatment. These tribunals would thus combine the sentencing function of the Court with the carrying out of the sentence, which is at present largely in the hands of administrative bodies.[1] The resulting changes might be represented as follows:

PRESENT POSITION FOR ADULT OFFENDERS:

Finding of Guilt	Choice of Treatment	Carrying out of Prescribed Treatment	After-care
Criminal Court.		Prison Commission, or Probation Officer under Supervision of Criminal Court.	Various more or less independent Agencies.

NEW SCHEME:

Finding of Guilt	Choice of Treatment	Carrying out of Prescribed Treatment	After-care
Criminal Court.	Treatment Tribunal, assisted by Prison Commission, Probation Officers, After-care Organizations, etc.		

Suggestions of this kind do not necessarily imply that the Treatment Tribunal ought to be in full charge of the actual Prison Administration, but they would mean that the sentences would be carried out

[1] The best discussion of this idea is to be found in Professor Sam Bass Warner and Dr. Henry B. Cabot's *Judges and Law Reform* (Harvard University Press, 1936), Chapter VIII.

under the permanent supervision and responsibility of the Tribunal. The great advantages that might accrue from the concentration of such extensive powers in the hands of one uniform body are obvious. The corresponding medical analogy—so it may seem at the first glance—would be the distribution of powers between the specialist who is exclusively called upon to give the diagnosis—this would be the magistrate or the jury who have to decide whether the prisoner is guilty of an offence—and the general practitioner in collaboration with the hospital.

It is here, however, where this comparison only too palpably fails: First, it is here just the general practitioner or even a lay doctor who would be called upon to give the diagnosis, whilst the specialist would have to prescribe and to supervise the treatment. Moreover the mere finding of guilt can, according to modern conceptions, no longer be regarded as a complete criminological diagnosis; it rather deals with one single symptom of the disease, and usually not even with the predominant one. The medical specialist called upon to diagnose a disease will certainly require a complete case history; he cannot possibly limit his examination to some chance symptoms the occurrence of which may be open to widely different interpretations in the light of those antecedents. The English judge or magistrate—in contradistinction to his Continental colleague—has to work under limitations of this kind whilst occupied with the question of guilt, since he is not permitted to know the previous history of the accused. This is a very decided restriction of his functions, and may sometimes seriously hamper the correct criminological understanding of a case; nevertheless it is necessary

in the interest of the safety of the accused citizen.[1] In its power of choosing the right sentence the Court may find a partial compensation for the restrictions which it has to accept during the first stage of the proceedings. Should the Criminal Court under the new scheme lose the function of imposing the sentence —that last link of real importance that connects it with the living personality of the offender—surely, the remaining body of criminal jurisdiction would not be very attractive. Criminal psychology ought not to be limited to the psychology of the offender; it should as well take into account the psychology of those who have to deal with him. The Reform of Criminal Justice should not, therefore, attempt to replace the existing division of powers by another one; rather should it aim at a complete unification of the whole sphere of Criminal Administration in the hands of a Court that would possess the necessary qualifications to act as a tribunal for the finding of guilt as well as for the imposing and the supervision of the carrying out of the sentence. Once more the question arises as to whether this idea of the "physician-judge"[2] is at all compatible with the essential character of a Court, and how such a Court should be composed. It might again be argued that the business of a judge is only to give judgement, and that he should have nothing to do with its execution, which should remain the domain of purely administrative bodies.[3] In England, in par-

[1] See the case referred to by the author in the *Journal of the Society of Public Teachers of Law*, 1937, p. 45.

[2] See *Proceedings of the XIth International Penal and Penitentiary Congress*, Berlin, 1935, p. 41. There the question was discussed at some length: "What powers must the judge of a Criminal Court possess in the execution of penalties?"

[3] See above, p. 173.

ticular, the traces of the system of prison administration by the local justices prior to 1877[1] may be somewhat deterrent. Modern penological conceptions, of course, seem to require another attitude, a fact that has now received official recognition by the recent Italian institution of the "Surveillance Judge" (*giudice di sorveglianza*).[2] It is his function to supervise the manner in which prison sentences are carried out. "In this way," as Monachesi puts it, "there is created in the Ministry of Justice an official who checks the work of the prison personnel, and who at the same time safeguards the rights and privileges guaranteed to the offender by the Criminal Code." This description clearly shows, however, that this new Italian experiment can by no means be regarded as a real solution of the problem. It may even be doubtful whether it represents a step beyond the English system of visiting justices.[3] In both cases, the co-operation of a magistrate, though it may have resulted in a better control of the prison administration, has hardly succeeded in making the judiciary as a whole more familiar with the effects of their own sentences on the individual offender. The Italian surveillance judge, being a professional member of the judiciary, will have the advantages of his better training, whilst the English visiting justice may enjoy greater freedom from official interference. Both of

[1] See, e.g., Sir Evelyn Ruggles-Brise, *The English Prison System* (1921), p. 65 et seq.; L. W. Fox, *The Modern English Prison* (1934); Leo Page, *Crime and the Community* (1937), pp. 49 and 55.

[2] Artt. 144 Codice Penale, 585 Codice di Procedura Penale. See Elio D. Monachesi, *Journal of Criminal Law and Criminology*, Vol. XXVI (1936), pp. 811 et seq.; Gunnar Dybwad, *Theorie and Praxis des fascistischen Strafvollzuges* (Bonn, 1934).

[3] See L. W. Fox, *The Modern English Prison* (1934), pp. 57 et seq.; Hobhouse-Brockway, Chapter XXV.

them, however, will, on the whole, be equally unable to establish a real unity of purpose between the Criminal Courts and the execution of the sentences imposed by them in the individual case. Professor Laski says:[1] "I believe that the system in which the judge's interest in a prisoner ends with his conviction is a mistake. If means were devised to associate the judge with the administration of prisons he would have what, as a rule, he now lacks, a much more intimate realization of his responsibilities." His suggestion is to divide the country in districts and to make a judge of the High Court responsible for the inspection of each district with the duty of visitation and report. Such a scheme would certainly have the advantage over the Italian system that the judge would not become completely estranged from his judicial work and could use his simultaneous Court experiences for his administrative functions, and vice versa. As the number of High Court judges, however, is very small, their districts might be too big for efficient supervision. Moreover, even here there would be no organic link between the judge and his individual cases. On the other hand, it must be admitted that the establishment of such a link might prove an insoluble task in actual practice, if it should lead to the interference not only of one but of many judges in the administration of prisons—an interference which might even go in different directions.

For such reasons it is clearly not feasible, except in a country of the smallest dimensions, to push the idea of the "physician-judge" to its logical conclusion.

One possible solution might be to leave the first

[1] H. J. Laski, *A Grammar of Politics* (1938 edition), p. 564 (George Allen & Unwin).

stage of the trial largely as it is and to establish for the following stage a Treatment Tribunal consisting of the same judge or magistrate who conducted the trial, but now assisted not by lay jurors or justices, but by experts taken from the ranks of psychologists, psychiatrists, social workers, etc., according to the special needs of the individual cases. Such an arrangement, whilst safeguarding the continuity of the proceedings through the person of the presiding judge or magistrate and securing a sufficient scope of action for him, might, on the other hand, be more acceptable to the general public than a tribunal exclusively composed of other experts, and which might not be regarded as a sufficient protection of the liberty of the citizen.[1] "Individualization of treatment," an American Criminologist argues with reference to the Treatment Tribunal idea, "can lead to concentration camps as well as to psychiatric therapy."[2] The participation of the judge or magistrate, it is believed, will bar the way to the concentration camp.

One of the chief difficulties arising out of the establishment of this tribunal—as already indicated—would lie in its relationship to the executive. Surely, such a Court would not easily content itself with the supervision of Probation Officers and Parole Boards; it would try to extend its influence to the actual treatment of individual cases in prisons and other penal institutions, and the drawing of a clear-cut demarcation line between both agencies would require much thought. Nevertheless, such a scheme might be possible, though it would considerably increase the

[1] See the admirable discussion of these problems by Warner-Cabot, op. cit., pp. 172 et seq.

[2] Nathaniel Cantor, *Journal of Criminal Law and Criminology*, Vol. XXIX, pp. 51 et seq.; *Crime and Society* (1939), p 259.

amount of Court work. Its advantage over the Italian system would be its organic connection with the individual case work, whilst its superiority over the Treatment Tribunal would consist in the preservation of a certain continuity between the various stages.

An inevitable consequence of a Treatment Tribunal would be a considerable widening of the applicability of the *Indeterminate Sentence*. It is in the essence of such a tribunal not to tie its hands in advance by imposing a sentence fixed as to length and even as to type. But here at once the traditional opposition to the whole principle of indeterminate sentences would raise its head, for such an experiment, it is believed, would involve too great a danger to the liberty of the individual.

The proposed establishment of a Treatment Tribunal leads also to a consideration of the general problem of how the much needed closer *collaboration* between the *lawyer*, on the one hand, and the *psychologist* and *psychiatrist*, on the other, might best be secured. It is not always realized that such a collaboration is indispensable in *all three stages* of the penal process: Whilst for the first and second stages it is needed to assist the Criminal Court in arriving at a right verdict and an appropriate sentence, the stage of carrying out the sentence may be used for psychological or psychiatric treatment. With this last stage we are not here concerned; the principal problems of it have just now received an admirable discussion in a Home Office Report which will have to form the basis of all future considerations of the question for many years.[1] There

[1] See the *Report on the Psychological Treatment of Crime*, published under the auspices of the Home Office. By Dr. W. Norwood East and Dr. W. H. de B. Hubert, London, H.M. Stationery Office, 1939.

is only one aspect of this part of the problem that seems to have for us some special importance. It is an indisputable merit of the Report that it lays the greatest emphasis upon the intrinsic limitations of the scope and possibilities of the psychological treatment of crime. These limitations are partly to be found in the nature of psychological treatment in general, partly they are due to the special situation of the offender, partly to the fact that the sentencing Court has to consider certain aspects wider than the mere treatment of the individual lawbreaker.[1] Here the scope of the principle of individualization necessarily ends. It would be intolerable if, for example, for a petty offence a very heavy sentence might be imposed, only because the mental condition of the offender might require very prolonged treatment.

For the first and second stages of the penal process the collaboration of the psychologist and psychiatrist can be secured by two different methods: in the way at present in use by calling them in as experts in suitable cases, or by appointing them as members of the Criminal Court itself, as already suggested for the Juvenile Courts. The appointment of such experts as members of a Treatment Tribunal, which would be competent only for the choice of sentence,[2] would greatly contribute towards reaching a closer conformity of views between the various professions concerned in dealing with crime. On the other hand, such a step would leave untouched the first part of the proceedings, i.e. the stage before the finding of guilt. This brings us again back to one of the major problems of Penal Reform: how far can and should psychology and

[1] See *Report on the Psychological Treatment of Crime*, p. 156.

[2] Above, p. 207.

psychiatry be permitted to penetrate into this first stage of criminal proceedings? English law has hitherto been rather unyielding in this respect, because of the view that to be made the object of a psychiatric examination means a dangerous encroachment on the liberty of the citizen and one which he is expected to tolerate only after having been found guilty of an offence, but never before.

Continental Codes, as is not surprising, are less reluctant in this respect. Under the German Code of Criminal Procedure, for instance, the Court has, under certain safeguards, but at any stage of the proceedings, the right to order a psychiatric examination of the accused and can even commit him to a mental institution for this purpose (§81). Of greater interest, however, may be the fact that an English expert of high rank, the late Dr. M. Hamblin Smith, has repeatedly stressed the point[1] that "it is of the first importance that mental examination should be made before final trial and sentence," because, as he says, "examinations made just after conviction are apt to be most misleading," owing to the emotional disturbance and anti-social feeling which are often the consequence of a conviction. And he was able to speak with (at the time of writing) twenty-three years of practical experience as a prison medical officer. His view, however, remained unacceptable, as his critics objected that a compulsory examination before conviction—preferable as it might be from the psychiatric point of view—"is not a procedure that public opinion is likely to approve."[2] Perhaps it might, however, be possible

[1] See his *Psychology of the Criminal* (1st edition, 1922), pp. 60 and 168.

[2] See the interesting (anonymous) remarks in the *Quarterly Review*, No. 518, October 1933, pp. 189–90.

to find a compromise solution: on the one hand, it is clear that, as a rule, no Criminal Court will make an order for psychiatric examination before having collected a reasonable amount of evidence to the effect that the accused person has actually committed an offence, as far as the external facts are concerned. And on the other hand, the more it is realized that a psychiatric examination does not imply any moral and social stigma, the less will such examination appear as an intolerable encroachment upon the liberty of the subject.

The Criminal Justice Bill, clause 38, provides that the Court shall remand the offender in custody or on bail for such period or periods, not exceeding three weeks in the case of any single period, as the Court thinks necessary to enable a medical examination and report to be made, provided that the Court is "satisfied that the offence has been committed." This is perhaps a phrase of sufficient elasticity to render possible the steering of a middle course. It is only necessary to interpret it as meaning "that the *external facts* of the offence have been committed" by the accused. This could enable the Court to order a psychiatric examination without tying its hands with regard to the *inner guilt* of the prisoner.

CHAPTER VII

FUTURE TRENDS OF PENAL REFORM

So far we have dwelt mainly upon those aspects of Penal Reform that illustrate its close dependence upon certain economic, social and legal factors. There are first the imperative necessities of public economy and the alleged or real demands of the principle of less eligibility that may make it difficult for the responsible authorities to pursue the most efficient methods of institutional treatment, of the employment of prisoners, payment of wages, and of After-care (Chapter III). Secondly, there are the social prejudices, as a consequence of which the lawbreaker is treated as the whipping-boy of his fellow-citizens [1] by being deprived of his civil rights and his social status, perhaps even of his livelihood (Chapters IV and V). And there is, finally, the dilemma in which the legal system finds itself when it attempts to reach a completely satisfactory compromise between the individual needs of the offender and the traditional idea that criminal justice, to be stable and impartial and to protect State and society, must remain on its guard against too close contact with the lawbreaker (Chapter VI). It is in the interplay of all these factors that the limitations of every attempt at Penal Reform are to be found. Nevertheless, not only from our previous chapters, but

[1] "Criminals"—writes Dr. Pryns Hopkins in *The Psychology of Social Movements* (1938) (George Allen & Unwin), p. 113—"are amongst the most pleasure-giving members of the social community. They become our whipping-boys, and permit us to work off our deep-seated hates and passions with the minimum of harm to ourselves."

still more from the many valuable publications, official and private, which have appeared in recent years, it becomes apparent how much progress has been made in particular since the end of the Great War.

In conclusion, some brief remarks may tentatively be offered as to the probable course which Penal Reform may take in future. Though—as is hardly necessary to emphasize—prophecy of any kind is here as dangerous as anywhere, certain trends already stand out so clearly that—other things remaining equal—their continuation seems likely.

"Other things remaining equal" means, of course, the absence of a major upheaval which, by destroying or at least completely changing the present social structure, would make all future developments incalculable. Attempts have occasionally been made, it is true, to establish certain theories which might enable us—even for periods of social upheaval—to forecast at least roughly the general trend of penal policy in accordance with the predominant political features of the time. In our first chapter an attempt was made to reduce the role of economic factors in penal history to its proper scope. Can we place more confidence in those other formulae which endeavour to explain that history by linking it up with certain tendencies of a political character?

Emile Durkheim[1] has tried to substantiate the thesis that the severity of a penal system depends upon

[1] As to the following text, see Emile Durkheim, "Deux Lois de l'Evolution pénale" (*L'Année Sociologique*, Vol. IV, 1899–1900, pp. 65 et seq.); Durkheim, *Division of Labour in Society* (translated by George Simpson, 1933), pp. 70 et seq.; Pitirim A. Sorokin, *Social and Cultural Dynamics*, Vol. II (1937), pp. 593–611 et seq.; Thorsten Sellin, *Research Memorandum on Crime in the Depression* (1937), pp. 8–9.

the degree of uniformity and unanimity within the community concerned as well as upon the power of its central authority, i.e. the greater the uniformity and unanimity among its members and the absolutism of its ruler, the greater its severity towards the law-breaker. The aim of punishment is not so much revenge or reformation or compensation, but the preservation of the existing unanimity of conscience. This is an idea that is closely linked to Durkheim's theory of crime: it is the essential element of his conception of crime that it affects the common conscience of all members of the community; consequently, the more profound its effect upon this conscience, the stronger will be the reaction. Crimes against the State or the religious feelings of the community are therefore more severely punished than crimes against life and property of the individual. Primitive people show the greatest uniformity of feeling, which explains the alleged cruelty of their penal system. Parallel with this thesis is the idea that centralized and absolute Governments punish more severely than liberal and democratic ones. If all this were generally true, our forecast could simply be that the progress of Penal Reform in the direction towards greater leniency would depend upon the increase in individualism of thought and upon the weakening of the strength of the Government.

Durkheim's theory has recently been forcefully attacked by Sorokin, who, in a most stimulating manner and supported by an enormous mass of historical material, has tried to establish the following law of penological development: It is not the unanimity of feeling amongst the community that leads towards greater severity; on the contrary, the more "ethico-juridical *heterogeneity* and *antagonism*" exists in a given

community, the more increases the amount as well as the severity of punishment imposed by one group upon the other. Penal history is *not* the story of progress from the alleged savagery of primitive peoples and absolute rulers to more enlightened methods; political and penal progress do *not* necessarily go hand in hand —reactionary Russia of the nineteenth century had, according to Sorokin, penal codes milder than those of republican France.

From the psychological point of view there is something to be said for both these theories: only a united community with the full power of its uniform convictions—we might say in support of Durkheim—will feel strong enough to inflict exemplary penalties upon those who disregard its rules. Heterogeneity means weakness, which has to compromise even with the criminal. On the other hand, we may ask: why should a strong community, united in its feelings, *want* to inflict brutal sanctions on the lawbreaker? Perhaps in order to please the offended gods—but when this motive no longer holds good, no obvious reason seems to offer itself. Has not history rather taught us that a strong centralized government used its power to fight the evil of blood revenge and the manifold abuses of the penal system by unscrupulous feudal lords? Moreover, we may say in support of Sorokin—it is obvious that heterogeneity breeds hatred, suspicion and fear, the best promoters of a cruel penal policy.

History is unable to help us entirely to solve this problem, since its evidence supports both views. Beaumont and Tocqueville, when studying American prison conditions, expressed their astonishment at the fact that the country with the most liberal political

institutions should possess a prison system which—rightly or wrongly—they described as "the spectacle of the most complete despotism."[1] And what examples are there to the contrary? We are not entirely convinced by Sorokin's reference to the alleged leniency of penal administration in nineteenth-century Russia, which seems to be true only with regard to the rather isolated example of Alexander II.[2] Moreover, as Sorokin himself rightly says, "the severity or mildness of punishment in the codes is not identical with the real amount and severity of punishment in social life."[3] It is, above all, the manner in which a certain penal code is applied to individual cases that constitutes the leniency or severity of a penal system. The over-harshness of the former English criminal law was softened to an almost incredible degree, though in a very haphazard and unfair manner, by the benefit of clergy. On the other hand, the alleged mildness of the Russian penal system of the nineteenth century loses much of its charm when we remember the treatment of political prisoners by the administrative authorities under the Tsarist régime. When trying to define our position towards such large-scale sociological conceptions as those of Durkheim and Sorokin, we should therefore first of all enquire into the real meaning of terms like "penal treatment," "unanimity" and "heterogeneity," "leniency" and "severity." Surely, our time seems to be particularly suitable for testing the truth of such

[1] See Beaumont–Tocqueville, op. cit., p. 47, and the indignation expressed by Lieber at "the impropriety of calling a system despotic which mainly grew out of the feeling of humanity."

[2] See the "Survey of the Development," by Foinitzki, in F. von Liszt, *Das Strafrecht der Staaten Europas*, Vol. I (1894), pp. 277 et seq.

[3] *Social and Cultural Dynamics*, Vol. II, p. 593 (George Allen & Unwin).

doctrines. Are we to regard the present totalitarian States as representing "homogeneous" communities and their penal systems as models of humanitarianism? Are their Penal Codes truly representative of their penal methods in general? There can be little doubt that uniformity of thought has in many respects increased in Germany under the Nazi régime; nevertheless it is common knowledge that the penal system has become much more severe since 1933. Sentences of penal servitude, which in 1932 numbered only 1·1 per cent of all sentences, were 3·2 per cent in 1934, and executions increased from 3 in 1932 to 75 in 1934.[1] Neither homogeneity nor heterogeneity—so it seems—are as such factors making for leniency or severity; we may rather have to distinguish various types of both, the one tending towards leniency, the other towards severity. Moreover, there may exist within one and the same community unanimity with respect to certain values, e.g. religious ones, and violent discord with regard to others, e.g. economic ones, or unanimity in matters of foreign policy, racial persecution, etc., and conflicts as far as domestic problems are concerned. Similarly, we may find leniency towards certain classes of the population (not only, as Sorokin points out, lenient treatment of some *types of crime*), coupled with the utmost cruelty towards others. Whilst real crimes committed by supporters of the régime are sometimes completely overlooked or readily pardoned,[2] the statute book becomes crammed with new offences aimed at the persecution and suppression of political,

[1] See Roesner in *Monatsschrift*, 1938, p. 342–3.

[2] See, e.g., the German Act of April 23, 1936, which provides an amnesty for all offences committed from "excessive zeal for the national-socialist idea."

racial or religious minorities. The latter may even, in actual practice, be taken out of the ordinary penal system and dealt with in a purely administrative way (transportation to Siberia, detention in concentration camps). It might therefore rather be said that heterogeneity within the community leads not to uniformly severe, but to *unequal* penal treatment, and that this inequality, which grows with greater heterogeneity, operates strongly to the disadvantage of the non-conforming sections of the population. It is open to doubt whether we may perhaps modify Durkheim's thesis to the effect that the severity of a penal system increases with the homogeneity of the ruling class. There is another aspect of the matter which may be mentioned in support of Sorokin: heterogeneity usually results in an increase in crime, which—not always, but sometimes—in its turn leads to greater severity of punishment.

To sum up: we cannot hope to predict the future trend of penal policy with the aid of general formulae of this kind, insufficiently supported as they have hitherto been. Rather should we base our forecast upon such concrete facts as are already clearly apparent.

The first fact of outstanding importance is that English public opinion is not yet unanimous in it support of the decidedly progressive penal policy of the Government. This is true of the public at large as well as of parliamentary and professional bodies. Leaving out critical remarks which refer to so such highly controversial problems as the abolition of flogging, two recent voices from authoritative quarters may be quoted out of a great number: "It seems to me, with regard to children and the way in which we deal with them, we have gone to the verge of sloppy sen-

timentality,"[1] and: "On the whole we cannot but fear that humanity and the desire to reform have gone too far, and will weaken the authority of the law especially as regards minor offences."[2]

On the other hand, there always seems to be available in this country a sufficient majority to secure a fair measure of quiet progress on the lines of individualization, reformation, de-stigmatization, which form the key-note of the Criminal Justice Bill. The tendency, already so clearly defined in the provisions of this Bill, not only to *de-stigmatize* institutional treatment and to provide a *greater variety* of its methods, but also to *restrict* its application to the indispensable minimum—this tendency will probably continue at a perhaps even more rapid pace.

In actual practice, all these three aims hang closely together. *De-stigmatization*, apart from the methods indicated in Chapters IV and V, may be best secured by a higher degree of *association* between the inmates of reformatory institutions and free workers during working hours—as envisaged by Colonel Turner who recommends it even for the murderer.[3] The prison visitors and prison teachers movement, admirable as it is, can tackle the problem only from one side; it introduces into the institution persons of a character superior to the average prisoner in social standing and education, persons who are supposed to spend only a small fraction of their time with the inmate and can

[1] Judge Earengey, *Transactions of the Medico-Legal Society*, Vol. IV (1936), p. 295.

[2] Mr. J. L. Parker in Edward Eyre, *European Civilization*, Vol. V (1937), p. 967.

[3] See his address on *Alternatives to Capital Punishment* (1938), pp. 9 et seq., and above, p. 121.

thus provide the jam, but not the bread and butter of daily life. It is only through permanent intercourse with decent working people of the prisoner's own social and occupational class that the lasting evil effects of institutional life can be avoided. The difficulties of such an experiment, no doubt, will be enormous —not only on the part of the free population, but perhaps still more on that of the better-type prisoner who might feel himself humiliated in the company of free workers.

This quite naturally leads to suggestions for the provision of a *greater variety* of institutional or semi-institutional methods. In one of the previous Chapters [1] it was tentatively suggested that the Compulsory Attendance Centres might one day be extended to adults convicted of offences for which short prison sentences of about 2–6 weeks are now imposed. For offences of a rather more serious character, for which, for one reason or another, imprisonment instead of probation is still regarded as indispensable, this might assume the form of residence within the penal institution combined with free labour outside. For suitable categories of offenders, the place of the penal institution may be taken by hostels, either of the proposed Howard House type extended to those over twenty-one, or ordinary hostels where the offender may live together with non-delinquents. In the latter case, such a sentence would be hardly distinguishable from Probation with condition of residence, though the supervision and restrictions might be made more marked. Moreover, the recent attempt to train delinquents and potential delinquents together in small privately run communities of the Q-Camp type might be extended, and

[1] See above, p. 135.

the Russian scheme of compulsory labour without loss of liberty might be tried.[1]

In other words, the gap, which—as far as adult offenders are concerned—at present exists between prison and Probation, might be bridged over from both sides: not only by retaining the already available possibility of imposing a condition of residence in a Probation Order, but also by providing penal institutions of a semi-open character where the inmates can, within limits, mix with the free population. The Camp System of the Wakefield type[2] —admirable and worthy of extension as it undoubtedly is—still keeps the prisoner at a distance from his fellow men. It is unnecessary to add that experiments of the above type can be risked only with suitable groups of prisoners—for them, however, they might well be tried. Some of those methods may still be profitable even for middle-aged or elderly persons who, whilst not being professional criminals, are not deemed by the Courts to be suitable subjects for Probation. Of the age groups above thirty, hardly any notice is taken by the Criminal Justice Bill.

Passing to the treatment of the *young offender*, it is most gratifying to find not only a great variety of methods which have already proved their worth, but also a permanent search for new types. Two recent reports, the *Fifth Home Office Report on the Work of the Children's Branch* (1938),[3] and the *Report of the Departmental Committee on Corporal Punishment* of

[1] Above, p. 131.

[2] The gradual development of this scheme can best be studied in the annual *Reports of the Prison Commission*, beginning with 1935; moreover, Leo Page, op. cit., p. 221.

[3] See p. 20 et seq.

the same year,[1] provide illuminating surveys of the work of classification and individualization that is here in progress. Moreover, it is in the treatment of Juvenile Delinquency that the tendency to refrain altogether from institutional methods is becoming more and more noticeable. The *Fifth Report of the Home Office, Children's Branch*, shows a considerable increase in committals of boys and girls to the care of a local authority which is then required to place the children with foster-parents, "institutional treatment thus being excluded,"[2] and it is stated that in course of time still greater use will probably be made of this power. In addition, the Home Office has devised a scheme to place young persons in approved lodgings for a time.[3] These innovations have apparently been due not only to the urgent need for alleviating the crowded conditions in Approved Schools—the sequel to the Children and Young Persons Act, 1933—but also to the conviction that institutional treatment of an offender should be resorted to only when there is no other remedy.[4] For those adolescents who are committed to Approved Schools or even to Borstal Institutions, the ties with the world outside are far less rigidly

[1] See p. 41 et seq.

[2] Such orders have increased from 354 in 1934 to 822 in 1936.

[3] *Report*, p. 52. The subject has recently been dealt with in a very comprehensive manner in the *Report of the League of Nations' Advisory Committee on Social Questions*: "The Placing of Children in Families" (Geneva, 1938, 2 vols.).

[4] Miss Cicely McCall, *They Always Come Back* (1938), pp. 228, 250 et seq., is very outspoken in her criticism of long-term institutional treatment of girls. In America the anti-institutional tendency is also growing; see, e.g., Sophia M. Robison, *Can Delinquency be Measured?*, pp. 5, 81; *Preventing Crime* (edited by Sh. and E. Glueck), p. 302.

severed than is still the case with the adult prisoner. The Home Office itself recommends, at least for junior schools, that the children should be sent to the local elementary schools to mix freely with other children, and in only one instance did this prove impossible owing to local opposition to "the admission of young thieves and criminals."[1] Borstal boys are allowed to attend evening technical schools,[2] though they are severely punished for meeting local girls, "because of the risk of giving the camp a bad name in the neighbourhood."[3] Mr. Arthur R. L. Gardner has expressed himself in favour of sending "young hooligans" instead of to Borstal to ordinary boarding schools where they could be "contaminated with traditional gentlemanly behaviour" and, in their turn, be of some use to the gentlemen.[4] Though this still seems somewhat visionary, the future development of Borstal, too, may lie in the direction towards greater collaboration with the world outside, which would have to be gradually extended from one stage of treatment to the next. The good influence of institutional life would then have opportunity to assert itself in a permanent struggle with external interference, instead of postponing the real test until discharge.

So much for the de-stigmatization and de-institutionalization of penal methods. There is, however, still another conception that is well worth further developing: *Compensation* of the victim. There can be little doubt as to the reason why this should for so long have been neglected as an aim of criminal procedure. It is because the victim and his kin had misused their former legal rights in this respect that the State had

[1] *Report*, p. 63. [2] *Prison Commissioners' Report*, 1937, p. 52.
[3] *Report*, 1937, p. 71. [4] *The Times*, December 16, 1938.

to step in and to clear the Criminal Courts of all civil claims. Now, we have arrived at the opposite extreme. "At the present day"—says Mr. Christmas Humphreys[1] —"the criminal is considered in a wealth of detail, the State but little, and the victim not at all." Though this statement seems somewhat exaggerated in its second part, the final complaint can hardly be refuted. English law, it is true, goes somewhat further than many other legal systems in allowing the victim to take his share in the proceedings by permitting him to instigate prosecutions. Moreover, there is the right given to the Criminal Court by section 4 of the Forfeiture Act, 1870, to order the offender convicted of felony to pay damages up to £100 and, finally, there is the Probation of Offenders Act, 1907, section 1 (3), which provides that Courts may, in addition to a Probation Order, order the offender to pay damages for injury or compensation for loss. It is doubtful, however, whether sufficient use is made of the existing possibilities.[2]

Sometimes, it is true, the exact assessment of the amount of damages caused by the offence would be too difficult to be made in the ordinary course of criminal proceedings, and in such cases this task should be left to the Civil Courts. Where difficulties of this kind do not arise, however, as a rule damages ought

[1] Humphreys and Dummett, *The Menace in Our Midst* (1937), p. 24.

[2] Kenny, *Outline of Criminal Law* (fourteenth edition, 1933), p. 96, confirms that the principle laid down in the Forfeiture Act is unfamiliar. As far as the Probation of Offenders Act is concerned, the *Report on the Social Services in Courts of Summary Jurisdiction* (1936) states that "much greater use could be made with advantage of this valuable power" (p. 52). See also Miss Elkin, op. cit., p. 152; E. H. Sutherland, *Principles of Criminology*, p. 537.

generally to be awarded by the Criminal Court together with the sentence or Probation Order, to make the injured party feel that his interests are not entirely neglected and to make the offender conscious of his responsibilities, which he may otherwise forget when the sentence itself is very lenient.

It might be useful to make a somewhat detailed study of the practical working of those Codes of Criminal Procedure which pay particular attention to the aspects of Compensation.[1]

If now the author should venture to bring into something like a scheme his principal suggestions, he is fully conscious not only of the fact that, for the greater part, they cannot claim any originality, but also of the debatable nature of some of the various points set forth. Should, nevertheless, even a small fraction of them, at some time or other, be deemed worthy of being given a trial, he would feel amply rewarded.

Quite naturally this scheme falls into five main parts: suggestions concerning institutional, semi-institutional and non-institutional treatment of offenders, as well as suggestions concerned with general methods of de-stigmatization and with questions of criminal procedure.

(A) *Institutional treatment* of lawbreakers should, with certain minor exceptions such as detention within the precincts of the Court, be altogether out of the question for periods of less than six weeks or, still better, three months.[2] Imprisonment, as envisaged in the Criminal Justice Bill, should be inadmissible for persons under

[1] See, e.g., French Code d'instruction criminelle, art. 3; Italian Code of Criminal Procedure, artt. 22 et seq.

[2] See above, p. 133.

twenty-one. Vocational training and the earning scheme, general education and the camp system in institutions might be further developed,[1] even at the risk of occasional criticism based upon the idea of less eligibility. Cautious experiments on a small scale in the mixing of selected groups of prisoners with free workers during working hours might be tried.[2]

In addition to the short-term Borstal Institution as envisaged by the Criminal Justice Bill, the small training colony for delinquents and non-delinquents (Q-Camps, etc.), might be useful.

The work of After-care seems to be in need of further financial support and social endorsement.[3] The same might apply to the care for the families of prisoners.

(B) *Semi-institutional Methods:* Their significance as well as their difficulties would be greatly increased, if restrictions of institutional methods, as suggested sub (A), should be adopted. In addition to those methods already in existence or planned under the Criminal Justice Bill, the following two extensions might recommend themselves:

(1) Compulsory Attendance Centres for adults;[4]
(2) Compulsory Labour without other loss of liberty.[5]

Together with the proposed greater elasticity of institutional methods, such a scheme would seem to provide all possible semi-institutional combinations between residential *control with uncontrolled labour*, on the one hand, and *freedom of home life with compulsory*

[1] See above, pp. 80, 91.
[2] See above, p. 220.
[3] See above, p. 93.
[4] See above, p. 135.
[5] See above, p. 130.

labour or *controlled leisure*, on the other—according to the special needs of the individual case.

(C) *Non-institutional Methods:*

(1) The grading of *fines* might be improved by adopting the Swedish system of distinguishing between the gravity of the offence and the financial means of the offender.[1]

(2) The payment of *Compensation* and *Damages* should receive greater attention by the Criminal Courts.[2]

(3) As far as *Probation* is concerned, it will require a certain period of time until the social after-effects of the new system of conviction will become apparent. Apart from this innovation, however, a clearer distinction might recommend itself between the successful and the unsuccessful probationer, by the cancellation of the entry of the conviction in the records after successful expiration of a sufficiently long period of Probation.[3] "Success" would, of course, have to be interpreted as meaning not only absence of re-convictions, but a positive change of social attitude.

(D) *Methods of De-stigmatization in general:* Here the introduction of a scheme of *Rehabilitation* would seem to be of paramount importance in order to restrict the legal and, as far as possible, the social after-effects of punishment to an appropriate period of time.[4] Any legal scheme of this kind, however, can be entirely successful only if supported by a provision which makes it unlawful for prospective employers, etc., to require any supplementary information.[5]

[1] Above, pp. 128 et seq.
[2] Above, p. 223.
[3] Above, p. 147.
[4] See above, pp. 150 et seq.
[5] See above, p. 152.

(E) *Changes in Criminal Procedure:*

(1) The raising of the lower age limit of criminal responsibility from eight to twelve, or—still better—to fourteen years, with a corresponding extension of Juvenile Court Jurisdiction up to eighteen years.[1]

(2) The establishing of a Chancery Jurisdiction for children below Juvenile Court age.[2]

(3) Within the ordinary Criminal Courts separate Divisions for young men and women between 18 and 21 years.[3]

(4) Minor changes in the Juvenile Court procedure with regard to cross-examination, oaths, etc.[4]

(5) Professional lawyers as chairmen and public prosecutors in Juvenile Courts?[5] Psychologists, psychiatrists and social workers as members of Criminal Courts?[6]

[1] See above, p. 190–4.
[2] See above, p. 195.
[3] See above, p. 198 et seq.
[4] See above, p. 182–3.
[5] See above, p. 182.
[6] See above, p. 209.

INDEX OF SUBJECTS

REPORTS

Clauses of the Criminal Justice Bill, 1938:

(The quotations refer to the original Bill, before its amendment by Standing Committee A)

INDEX OF PERSONS

OVERLEAF

particulars of publications
of similar interest
issued by

GEORGE ALLEN & UNWIN LTD
LONDON: 40 MUSEUM STREET, W.C.1
LEIPZIG: (F. VOLCKMAR) HOSPITALSTR. 10
CAPE TOWN: 73 ST. GEORGE'S STREET
TORONTO: 91 WELLINGTON STREET, WEST
BOMBAY: 15 GRAHAM ROAD, BALLARD ESTATE
WELLINGTON, N.Z.: 8 KINGS CRESCENT, LOWER HUTT
SYDNEY, N.S.W.: AUSTRALIA HOUSE, WYNYARD SQUARE